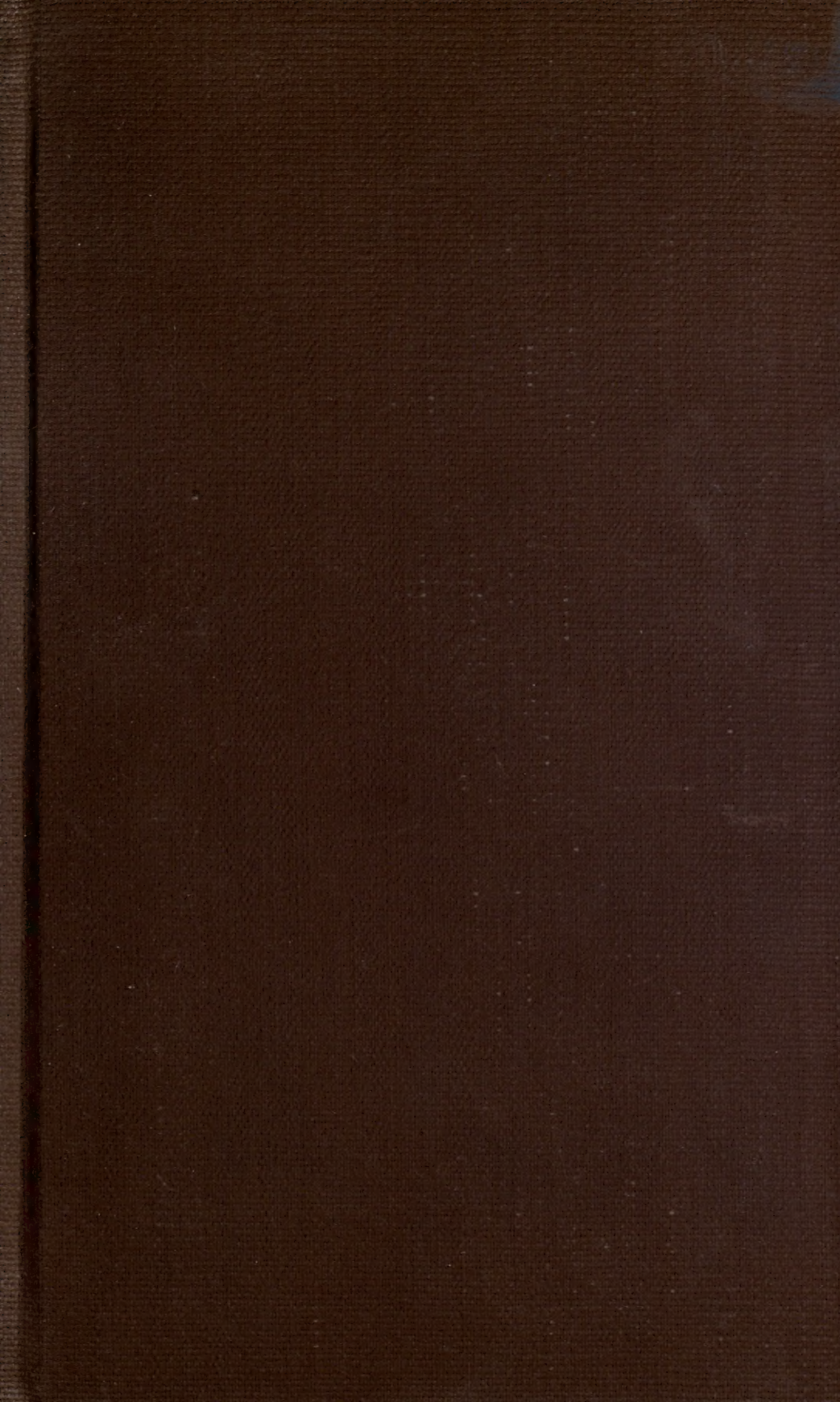
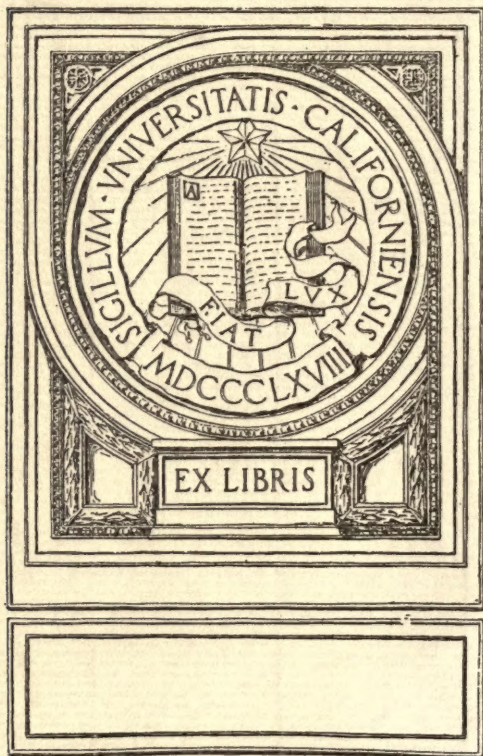




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CONTENTS.

Commentaries upon International Law. By Robert Phillimore, M. P., Advocate to Her Majesty in her Office of Admiralty, Author of "The Law of Domicil." "Legum denique idcirco omnes servi sumus, ut liberi esse possumus." CICERO *pro A. Cluent.* § 53. "*The various Transactions and Concordats between Sovereigns and the See of Rome*;—a succinct and impartial history of them is wanting: the papal arrangements with Bonaparte would not be the least curious part of such a work."—*Horæ Juridicæ Subsecivæ*. By Charles Butler (1804,) p. 118. Vol. II.



COMMENTARIES

UPON

INTERNATIONAL LAW.

BY

ROBERT PHILLIMORE, M.P.,

ADVOCATE TO HER MAJESTY IN HER OFFICE OF ADMIRALTY, AUTHOR OF "THE
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Walton, 1841-1866, 2 vols.

C73
v.2

CONTENTS.

The pages referred to are those between brackets [].

PART V.

CHAPTER I.

RIGHTS INCIDENT TO THE EQUALITY OF STATES. Pp. 1, 2.

CHAPTER II.

RIGHTS OF PROTECTING CITIZENS IN FOREIGN COUNTRIES. Pp. 3—7.

CHAPTER III.

SUBJECT CONTINUED. Pp. 8—14.

Debts of the State. Lord Palmerston's Letter in 1848. Debts guaranteed by Treaty. Depreciation of Money by Debtor State. Property of the Subject liable to the Debts of the State.

CHAPTER IV.

RECOGNITION. Pp. 15—32.

A kind of Moral Intervention. Different kinds of Recognition. Virtual and formal Recognition. Historical Instances:—United Netherlands; Portugal; Commonwealth of England; Pretender; North American United States; Governments in France since 1792. Decisions of Municipal Tribunals. Recognition of Titles of Dignity.

CHAPTER V.

RIGHT TO EXTERNAL MARKS OF HONOUR AND RESPECT. Pp. 33—54.

Maritime Honours. Insignia of the State. Precedence at Congresses. Royal Honours. Rank of States. Language of International Communication.

CHAPTER VI.

TREATIES. Pp. 55—69.

Their Place in the System of International Law. Different Modes of considering them. Who may contract. Reciprocal Consent. What may be the Subject of. Modes of confirming.

CHAPTER VII.

TREATIES. Pp. 70—78.

Guarantees, different kinds of.

CHAPTER VIII.

TREATIES. Pp. 79—110.

Interpretation of.

(A.) Literal Interpretation.

(B.) Logical Interpretation.

(1.) Uncertainty.

(2.) Impropriety of Language.

General Rules respecting. Uncertainty of Expression, arising from—

(1.) Incompleteness.

(2.) Ambiguity of Language.

(a.) Ambiguity of single Expressions.

(b.) Of General Construction.

Two general Rules relating to. Impropriety of Expression. Rectified by—

(1.) Restrictive.

(2.) Extensive Interpretation.

Case of Russo-Dutch Loan. *Eadem ratio idem jus*. Things favourable; odious.

CHAPTER IX.

COLLISION OF TREATIES. Pp. 111—116.

Rules respecting. Decisions of British and American Courts.

PART VI.

CHAPTER I.

RIGHTS OF SOVEREIGNS. Pp. 117—133.

Historical Instances. Decisions of Dutch, French and English Tribunals.

CHAPTER II.

EMBASSY. Pp. 134—146.

General Arrangement of the Subject. Who may send Embassy.

CHAPTER III.

EMBASSY, RIGHT TO RECEIVE. Pp. 147—155.

Right to refuse. Resident Embassy.

CHAPTER IV.

EMBASSY. Pp. 156—163.

General Rights of. Injuries to—Feciales.

CHAPTER V.

EMBASSY, ROMAN LAW RESPECTING. Pp. 164—169.

Inviolability of. Christian Church. Middle Ages.

CHAPTER VI.

EMBASSY, EXTENT OF INVIOABILITY. Pp. 170—172.

CHAPTER VII.

EMBASSY, INVIOABILITY OF. CRIMINAL LAW. Pp. 173—189.

Whether, and how far, Ambassador amenable to. Cases respecting.

CHAPTER VIII.

EMBASSY. EXTERRITORIALITY. CIVIL JURISDICTION. Pp. 190—215.

How far Ambassador amenable to. Cases respecting. His Suite; Taxes; Duties; his Hotel; Chapel.

CHAPTER IX.

EMBASSY. DIFFERENT CLASSES OF PUBLIC MINISTERS. Pp. 216—224.

CHAPTER X.

EMBASSY. INSTRUCTIONS OF AMBASSADORS. CREDENTIALS. Pp. 225—228.

CHAPTER XI.

EMBASSY. ARRIVAL OF AMBASSADOR. Pp. 229—234.

Audience. Alteration and Close of Mission.



PART VII.

CHAPTER I.

CONSULS. HISTORICAL INTRODUCTION. Pp. 235—239.

CHAPTER II.

CONSULATE IN CHRISTIAN COUNTRIES. Pp. 240—251.

Consuls-General. Vice-Consuls. Treaties respecting.

CHAPTER III.

CONSULS. DUTIES AND POWERS OF. Pp. 252—259.

CHAPTER IV.

CONSULS. DECISIONS OF MUNICIPAL TRIBUNALS RESPECTING. Pp. 260—270.

CHAPTER V.

CONSULS IN THE LEVANT—IN CHINA. Pp. 271—275.

PART VIII.

INTERNATIONAL STATUS OF FOREIGN SPIRITUAL POWERS, ESPECIALLY OF THE POPE.

CHAPTER I.

RELIGION AND THE STATE. Pp. 277—280.

Division of the Subject, and Order of Treatment in the following Chapters.

CHAPTER II.

GENERAL OBSERVATIONS AS TO THE RIGHT OF THE STATE TO SUPERINTEND, WITHIN ITS TERRITORIAL LIMITS, ALL RELIGIOUS DOCTRINES TAUGHT, AND THE TEACHERS OF THEM. THE EARLY CONNECTION OF THE CHRISTIAN CHURCH WITH THE STATE. Pp. 281—297.

Influence of Religion.—Church.—Collegium licitum.—Church under Constantine.—Pepin le Bref.—Identity of Church and State.

CHAPTER III.

THE GROWTH OF THE AUTHORITY AND PRETENSIONS OF THE POPE.
P. 298—306.

Collision between Church and State after the time of Charlemagne.—*Jura Majestatis circa sacra. Corpus Juris Canonici.*

CHAPTER IV.

THE CORPUS JURIS CANONICI, AND THE PRINCIPLES CONTAINED THEREIN, AND IN SUBSEQUENT BULLS, AT VARIANCE WITH INTERNATIONAL LAW. Pp. 307—333.

Venerabilem. Solitæ. Ad Apostolicæ. Clericis Laicos. Quod Olim. Unam Sanctam and Meruit. Romani Principes. Pastoralis. Si Fratrum. De Consuetudine. The Bull, *In Cænâ Domini*.

CHAPTER V.

THE INTERNATIONAL STATUS OF THE PAPACY BETWEEN THE PERIOD OF THE PROMULGATION OF THE CANON LAW AND THE COUNCIL OF TRENT. Pp. 334—347.

Height of Papal Power. Pragmatic Sanctions. *Concordata*. French Church. German Concordata.

CHAPTER VI.

THE PERIOD OF THE COUNCIL OF TRENT, AND ITS EFFECT UPON INTERNATIONAL RELATIONS. Pp. 348—357.

Treaty of Westphalia.

CHAPTER VII.

THE INTERNATIONAL RELATIONS OF THE PAPACY WITH FOREIGN STATES IN WHICH THE ROMAN CATHOLIC CHURCH IS ESTABLISHED, DURING THE PERIOD BETWEEN THE REFORMATION AND THE PRESENT TIME. THE HISTORY OF CONCORDATA. Pp. 358—396.

Relations of Rome with France. *Monitorio di Parma*. Napoleon and Rome. Subsequent Relations between France and Rome. Papal Relations with Austria—with Hungary—with Spain—with Portugal—with The Two Sicilies—with Sardinia—with Tuscany—with Bavaria.

CHAPTER VIII.

THE INTERNATIONAL RELATIONS OF THE PAPACY WITH FOREIGN STATES IN WHICH A PROTESTANT CHURCH IS ESTABLISHED. BULLÆ CIRCUMSCRIPTIONUM. Pp. 397—409.

Papal Relations with Prussia—with Hanover—with smaller German Protestant States—with Saxony—with Switzerland.

CHAPTER IX.

THE INTERNATIONAL RELATIONS OF THE PAPACY WITH STATES IN WHICH A BRANCH OF THE CATHOLIC CHURCH, NOT IN COMMUNICATION WITH ROME, IS ESTABLISHED. Pp. 410—427.

Papal Relations with Russia—with the Ottoman Porte—with England.

CHAPTER X.

THE ELECTORS, MINISTERS, AND COURTS OF THE POPE CONSIDERED IN THEIR RELATIONS TO FOREIGN STATES. Pp. 428—448.

CHAPTER XI.

INTERNATIONAL STATUS OF THE PATRIARCHATE OF CONSTANTINOPLE.
Pp. 449—454.

Relations of the Greek Church with Russia. Concordat between Patriarch and Kingdom of Greece. Aggression of Rome upon Greek Church. Protest of Greek Church.

For Contents of Appendix, see Chapter of Contents preceding Appendix.

EXPLANATION OF REFERENCE TO THE CORPUS JURIS CIVILIS.

THROUGHOUT this Work the Roman Law is cited according to what *à priori* might seem the natural manner, namely, a reference is made to the *Institutes*, *Digest*, the *Code*, or the *Novells*, by an abbreviation of the first syllable of each of these members of the *Corpus Juris Civilis*, then to the number of the *book*, then to the number of the *title*, then to the number of the *law*, and then to the number of the *section* or *paragraph*, as *Inst.* l. ii. t. i. s. 1, meaning *book i. title i., and sec. 1, of the Institutes of Justinian*; *Dig.* xxvii. 1, 13, 2, meaning *Digest, book xxvii. title i. law 13, sec. 2*; *Cod.* iii. 39, 5, meaning *The Code, book iii. title 39, law 5*. The *Novellæ*, or *Novells*, are cited according to the number of the *Novell*, which is subdivided into *capita* or *sections*, as *Nov.* xxi. 2, meaning *Novel xxi. cap. 2*.

The *Corpus Juris Civilis* is usually cited by Continental writers as follows—

The Institutes, by the letters *Inst.*, *Instit.*, or *I.* The number of the paragraph, followed by the rubric or heading of the title, thus—

§ 3. *Inst. De Nuptiis.*

Sometimes the reference is made by the numbers of the paragraph, book, or title, thus—

§ 3. *Inst. i. 10.*

The letters *princ.*, *pr.*, or *princip.*, indicate the commencing paragraph of a title, as the numbering commences with the second.

The *Digest*, or *Pandects*, are usually indicated by the older Continental writers by the letters *ff.*

The letter *L.* means Law, and the mark § means section of the law. The words after the letters *ff.* give the rubric or heading of the title or chapter. Thus, for instance, *L. 49, § 1, ff. De Act Empt.*, signifies *Law 49, parag. 1, in the Pandects, title De Actione Empti.*

Sometimes the first words of the law are cited.

Sometimes the reference is in this manner, the letters *Pand.* (used instead of *ff.*) *D.*, or *Dig.*, all of which signify *Justinian's Pandects*.

Sometimes the letter or letters indicating the *Pandects* are placed last thus—

L. profectitia, § si pater D. De Jure Dot.

Or, the numbers of the law and paragraph are given, instead of their initial words, thus—

L. 5, § 6., De Jure Dotium.

The law cited is sometimes indicated by the letters *Fr.*, instead of *L.*

The Code.

The *Code of Justinian* is cited in the same way as the *Pandects*, and indicated by the letters *Cod.* or *C.*; and some writers use the letters *Constit.* (*Constitutio*) instead of *L.*

The *Novells*, or later Constitutions in the *Corpus Juris.*, are indicated by the words *Nov.* or *Novel.*

AN EXPLANATION OF THE REFERENCES TO THE BOOKS OF THE CANON LAW.

- X. i. 9. 6. 4.—That is to say, book the first, title the ninth, chapter the sixth, and paragraph the fourth of the *Decretals* of Pope Gregory the Ninth. The letter X. denoting the *Decretals* of that Pope.
- VI. 3. 4. 23.—Book the third, title the fourth, and chapter the twenty-third, of the sixth book of the *Decretals* by Pope Boniface the Eighth.
- Clement.* 2. 5. 2.—Book the second, title the fifth, and chapter the second of the *Clementines*.
- Extra.* 14. 3.—That is to say, title the fourteenth, and chapter the third of the *Extravagants* of Pope Joan the Twenty-second.
- Comm.* 3. 2.—That is to say, book the third, and chapter the second of the *Communes*.
- Dist.* 76. c. 2.—Distinction the seventy-sixth and chapter the second of the first part of the *Decrees*. And if a V. consonant, or this note be added, viz. §, it denotes the verse or paragraph of that chapter, as *Dist.* 16, c. 2, v. 3, or § 3.
16. Q. 7. 3.—That is to say, cause the sixteenth, question the seventh, and chapter the third, of the second part of the *Decrees*.
- Con.* 1. 2.—Distinction the first and chapter the second of the third part of the *Decrees*.

All these books of the Canon Law are likewise sometimes quoted by the initial words of the law or chapter itself, and by the words of the title; as thus, *Ex specialis*, *extra de Judæis*, that is to say, cap. 17. tit. 6. of the fifth book of *Gregory's Decretals*; for the word *Extra* imports these *Decretals*, as well as the *Extravagants*.

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Competente Dissertatio.

LIST OF REPORTS.

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Bingham's.
Bosanquet and Puller's.
Burrows'.

C.

Campbell's.
Clarke and Finnely's.
Consistory (Haggard's.)

D.

Dodson's (Admiralty.)
Douglas'.
Dow and Clarke's.
Dowling's.
Durnford and East's.

E.

Edwards' (Admiralty.)

H.

Haggard's (Admiralty.)
" (Consistory.)

K.

Knapp's Privy Council.

L.

Law Journal.

M.

Maule and Selwyn's.
Modern.

R.

Robinson's (Christopher) Admiralty.
Robertson's Ecclesiastical.

S.

Simons's.
Strange's.

T.

Taunton's Reports.

V.

Vernon's Cases.
Vesey's.
Vesey and Beame's (Chancery.)

W.

Wilson's.

Y.

Young and Collier's.

AMERICAN.

B.	J.
Baldwin's.	Johnson's.
Bay's.	
Bee's.	M.
	Martin's.
C.	Massachusetts.
Cranch's.	Miles'.
	P.
D.	Peters'.
Dallas'.	Paine's.
Devereux's Equity.	
	T.
F.	Taylor's.
Freeman's Chancery.	
	W.
G.	Walker's Chancery.
Gallison's.	Washington's C. C.
	Wheaton's.
H	
Hill's.	Y.
	Yerger's.

FRENCH.

Gazette des Tribunaux.

LIST OF CASES

CITED IN THIS VOLUME.

The pages referred to are those between brackets [].

A.

Albrecht v. Sussman, 270.

B.

Barbuit's Case in Chancery, 263.
Bass (M. de) French Minister, Case of, 180.

C.

Charlotte, The, 115.
Christiansberg, The, 100.
City of Berne in Switzerland, The, v. The Bank of England, 25.
Clarke v. Crecow, 267.
Colebrook v. Jones, 269.
Columbian Government v. Rothschild, 132.
Cross v. Talbot, 199.

D.

Dalrymple v. Dalrymple, 348.
Darling v. Atkins, 200.
De Haber v. Queen of Portugal, 125.
Diana, The, 115.
Dolder v. The Bank of England, 25.
Duke of Brunswick v. King of Hanover, 125.

Duke de Montellano v. Christin, 133.

E.

Eliza Ann, The, 115.
Elphinstone v. Bedrecchund, 115.
Emperor of Brazil v. Robinson and others, 133.
England (Ambassador of, at Constantinople,) Case of, 180.
Evans v. Higgs, 199.

F.

Falcon, The, 270.
Fama, The, 115.

G.

Gratitudine, The, 100.
Gyllenburg (Swedish Ambassador,) Case of, 181.

H.

Heathfield v. Chilton, 198, 266.
Hoey (M. Van,) Case of, 182.
Holdernessee (English Ambassador at Venice,) Case of, 181.
Hope and others, The, 270.
Hopkins v. De Robeck, 200.

Hotham v. East India Company,
115.

I.

Indian Chief, The, 269.

Inoyosa and Colonna (Spanish Ambassadors,) Case of, 179.

J.

Josephine, The, 270.

K.

King, The, in his Office of Admiralty, v. Miller, 43.

King, The, v. Benson, 43, 44.

King of Spain v. Hullett and Widdler, 132.

L.

Le Louis, The, 61.

Lindo v. Rodney, 115.

Lockwood v. Coysgarne, 199.

M.

Maltass v. Maltass, 79, 115.

Manilla, The, 26.

Marryat v. Wilson, 115.

Masters v. Manby, 199.

Minerva, The, 43.

Molly, The, 115.

N.

Novello v. Toogood, 198.

O.

Oldknow v. Wainwright, 308.

P.

Pilkington v. Commissioners, &c.,
14.

Pilkington v. Stanhope, 201.
President, The, 270.

Q.

Queen, The, in her Office of Admiralty, v. James N. Forbes, 43.

R.

Richardson v. Anderson, 114,
115.

Ringende Jacob, The, 112, 115.

Rothschild v. Queen of Portugal,
132.

S.

Sa (Don Pantaleon,) Case of, 182.
Swift v. Kelly, 348.

T.

Taylor v. Barclay, 26.

—— v. Best and others, 193,
200, 202.

Thompson v. Powles, 26.

Triquet and others v. Bath, 199,
266.

V.

Viveash v. Becker, 199, 260,
268.

W.

Wadsworth v. Queen of Spain,
125.

Widinore v. Alvarez, 199.

Y.

Yrisarri v. Clement, 26.

Z.

Zacheman, The, 115.

AMERICAN.

A.

- Amiable Isabella, The, 116.
 Anderson v. Lewis, 116.
 Arnold v. United Insurance Com-
 pany, 270.

B.

- Blight v. Rochester, 115.
 Bolchos v. The Three Negro Slaves,
 116.
 British Consul v. Ship Mermaid,
 116.

C.

- Cabrera, *Ex parte*, 186, 197.

D.

- Dupont v. Pichon, 206.

F.

- Foster v. Neilson, 115.

G.

- Garcia v. Lee, 116.
 Gelston v. Hoyt, 27.
 Gordon v. Kerr, 115.
 Graham v. Pennsylvania Insurance
 Company, 116.
 Griswold v. Washington, 270.

H.

- Hamiltons v. Eaton, 79, 116.
 Henderson v. Poindexter, 116.
 Hutchinson v. Brock, 115.
 Hylton v. Brown, 116.

J.

- Jackson v. Porter, 116.

M.

- Miller v. Gordon, 116.

- Miller v. The Resolution, 116.
 McNair v. Ragland, 116.

O.

- Orser v. Hoag, 116.

P.

- Pizarro, The, 115.

R.

- Respublica v. De Longchamps,
 186, 197.
 Rose v. Himeley, 27.

S.

- Santissima Trinidad, The, 116.
 Society v. New Haven, 115.
 Society (the) for the Propagation
 of the Gospel, &c. v. Wheeler,
 104.
 St. I. Indiano, The, 115.
 Stockton v. Williams, 116.

T.

- Torlade v. Barazzo, 185.

U.

- United States, The, v. Palmer, 27.
 ——— v. Percheman, 115.
 ——— v. Benner, 158, 185.
 ——— v. Little, 185.
 ——— v. Ortega, 185.
 ——— v. Hand, 206.

W.

- Ware v. Hylton, 109.
 ——— v. Highton, 116.
 Whitaker v. English, 115.
 Wilson v. Smith, 116.

FRENCH.

A.

Affaire de la Maison Balguerie, de
Bordeaux, contre le Gouverne-
ment Espagnol, 126.

Affaire de MM. Ternaux, Gan-
dolphé, et Compagnie, contre la
Republique d'Haiti, 126.

C.

Cellamare, Case of, 184.

H.

Hermann, Delong, Case of, 262.

S.

Soller, M., Case of, 262.

Solon, M., against Mehemet Ali,
127.

Sully (Duc de,) Case of one of the
Retinue of, 178.

COMMENTARIES
UPON
INTERNATIONAL LAW.

PART THE FIFTH.

CHAPTER I.

RIGHTS INCIDENT TO THE EQUALITY OF STATES.

I. It has been said^(a) that the Rights incident to EQUALITY seem to flow, more especially, from the second of the two propositions, upon which the science of International Law is mainly built; namely, the proposition that each State is a member of an Universal Community; and it has been observed that the principal Rights incident to this doctrine of the EQUALITY of States, are the following:—

I. The Right of a State to afford protection to her subjects wheresoever commorant:^(b) and under this category must be considered the important question of Debts due by the Government of one State to the Subjects of another.

*II. The Right to the Recognition of the Government of one State by the Government of other States. [*2]

III. The Right of each State to external Marks of Honour and Respect from other States.

IV. The Right of each State to enter into International Covenants and Treaties with other States.

It is proposed to consider these subjects in the following Chapters.

(a) Vide ante, vol. i. part i. c. 2, p. 9; part iii. c. 2, p. 162.

(b) Grotius, l. iii. c. ii. Quomodo jure gentium bona subditorum pro debito imperantium obligentur: ubi de repressaliis.

Vattel, l. ii. c. xiv. sec. 216.

Heffters, 134.

Martens, l. iii. c. 3, sec. 110.

[*3]

*CHAPTER II.

RIGHT OF PROTECTING CITIZENS IN FOREIGN COUNTRIES.

II. THE limitation which this Right of Protection prescribes to the foregoing Right of Jurisdiction, may be in a great measure inferred from what has been stated with respect to the extent of the latter Right.

"Prima autem maximèque necessaria cura pro subditis, sive qui familiari, sive qui civili subsunt imperio; *sunt enim quasi pars rectoris*;" is the language of Grotius;(a) and Vattel,(b) following in the same track, observes:—"Quiconque maltraite un citoyen, offense indirectement(c) l'Etat qui doit protéger ce citoyen."(d)

It has been said that every individual who enters a foreign territory, binds himself, by a tacit contract, to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm. The converse of the proposition is equally true.

Foreigners, whom a State has once admitted unconditionally into its territories, are entitled not only to freedom from injury,(e) but to the execution of justice(f) in respect *to their transactions *with the* [*4] *subjects of that State*. No country has a right to set, as it were, a snare for foreigners; therefore conditions hostile to their interests, or different from general usage, must be specified beforehand(g) Foreigners are not, as will be seen hereafter, strictly speaking, entitled to demand as a *right* the execution of justice in civil matters relating to affairs either *between themselves*, or between themselves and the citizens of a *third* State. How far the COMITY of nations extends to these last two cases will be considered hereafter.(h) It is only necessary to remark here, that the refusal on the part of a State to do justice between commorant foreigners, with respect to disputes which have arisen from transactions in that State, is, to say the least of it, a very gross violation of that Comity.(i)

III. The State, to which the foreigner belongs, may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice in the foreign country. The State of the

(a) Grotius, l. ii. c. xxv. *De causis belli pro aliis suscipiendi*.

(b) Heffters, ss. 6, 59, 60.

Vattel, l. ii. vi. *De la part que la nation peut avoir aux actions de ses citoyens*.

(c) Vide ante, vol. i. p. 355.

(d) Grotius, ubi supra. Vattel, ubi supra.

(e) *Correspondence respecting the Arrest of Mr. Harwood (the Vienna Correspondent of "The Morning Chronicle") by the Austrian Authorities at Vienna, 1852-3*. Laid before Parliament, 1853.

(f) *Debates in both Houses of Parliament on the Affairs of Greece and the Claims of Don Pacifico*.—Hansard's Parl. Deb. June, 1850.

(g) "Dès qu'il les reçoit, il s'engage à les protéger comme ses propres sujets, à les faire jouir, autant qu'il dépend de lui, d'une entière sûreté."—Vattel, l. ii. c. viii. s. 104.

(h) Vattel, l. ii. c. viii. *Règles à l'égard des étrangers*.

(i) Vattel, l. ii. c. viii. sec. 103. "Les différends qui peuvent s'élever entre les étrangers, ou entre un étranger et un citoyen, doivent être terminés par le juge du lieu, et suivant les lois du lieu."

foreigner may insist upon reparation immediately in the former case. In the latter the interference is of a more delicate character. The State must be satisfied that its citizen has exhausted the means of legal redress afforded by the tribunals of the country in which he has been injured. If those tribunals are unable or unwilling to entertain and adjudicate upon his grievance, the ground for interference is fairly laid. But it behoves the interfering State to take the utmost care, first, that the commission of the wrong be clearly established; secondly, that the denial of the local tribunals to decide the question at issue be no less clearly established.

It is only after these propositions have been irrefragably [*5] *proved, that the State of a foreigner can demand reparation at the hands of the Government of his country; and it is not till after the Executive as well as the Judicial Authorities have refused redress, that recourse can be had to Reprisals, (k) much less to War.

As a general rule, no objection to the forms of procedure, or the mode of administering justice in the courts of the country, can found any such demand; the foreigner should have considered this matter before he entered into transactions in the country. Nevertheless, a plain violation of the substance of natural justice, e. g. refusing to hear the party or to allow him to call witnesses, would amount to the same thing as an absolute denial of justice.

“Jus repressalium (says Grotius) fieri intelligitur non tantum si in sontem aut debitorem judicium intra tempus idoneum obtineri nequeat, verum etiam si *in re minimè dubiâ* (nam in *dubiâ* re præsumptio est pro his qui ad judicia publicè electi sunt) planè contra jus judicatum sit; nam auctoritas judicantis non idem in exteros quod in subditos valet exteri autem jus habent cogendi, sed quo uti non liceat quamdiù per judicium suum possint obtineri.” (l)

It is impossible to state the law more ably or more clearly than it is laid down in the reply of Great Britain, 1753, to the King of Prussia. (m) According to that statement, “The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in cases of violent injuries directed or supported by the State; and justice absolutely denied *in re minimè dubiâ* by all the tribunals, and afterwards by the Prince.” (n)

*IV. The distinction between domiciled persons and visitors in or passengers through a foreign country is never to be lost sight of; [*6] because it must affect the application of the rule of law which empowers a nation to enforce the claims of its subjects in a foreign State. The foreign domicil does not indeed take away this power but it renders the invocation of it less reasonable, and the execution of it more difficult.

A subject who has deliberately domiciled himself in another State, can have no ground of complaint, if he be subjected to many taxes and im-

(k) Vide post.

(l) Grotius, l. iii. c. ii. s. 5.

(m) 2 Martens' Causes Célèbres, part i.

P. 57 of Memorial.—Cabinet Library of Scarce and Celebrated Tracts, vol. i.

(n) Treaty between England and Holland, July 31, 1667. Reprisals not to be granted till justice has been demanded according to the ordinary course of law.

sitions from which the simple stranger would, by the usage of nations, be exempt. Moreover he must be held to have considered the habits of the people, the laws of the country, and their mode of administration, before he established therein his household gods, and made it the principal seat of his fortunes. He cannot therefore expect, that every complaint, which he may be disposed to urge upon his native Government, with respect to these matters, will of necessity be considered as requiring national interposition. More especially, if, being permitted by the law of his domicile, he have purchased land, and thus incorporated himself, as it were, into the territory of a foreign country, he cannot require his native Government to interfere on the subject of the operation of municipal laws, or the judgment of municipal tribunals upon his rights of immovable property in this foreign land.

The case must be one of flagrant violation of Justice, which would lay the foundation of an International remonstrance in such a matter; unless, indeed, the provisions of some particular treaty,^(o) or some public proclamation of the foreign Government, take the case out of the application of the general law.

Grotius takes this distinction very strongly between the actually domiciled and the merely commorant foreigner, in his discussion on the important question upon which we are now ^{about to enter}, viz., as [^{*7}] to the liability of the nation at large for the obligations incurred by their Government.—“*Jure gentium subjacent pignorationi omnes subditi injuriam facientis, qui tales sunt ex causâ permanente, sive indigenæ, sive advenæ: non qui transeundi aut moræ exiguæ causâ alicubi sunt.*”^(p)

[^{*8}]

*CHAPTER III.

RIGHT OF PROTECTING CITIZENS IN FOREIGN COUNTRIES.—DEBTS OF THE STATE.

V. THE right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when the foreign state has become itself the debtor of these citizens.

It must, of course, be assumed that such State has, through the medium of its proper and legitimate organs, contracted such debt; whether that organ be the Sovereign alone, according to the constitution of Russia, or the Sovereign and Parliament, according to the constitution of England, the debt so contracted with foreign citizens, whether in an individual or a corporate capacity, constitutes an obligation of which the country of the lenders has a right to require and enforce the fulfilment. Whether it will exercise that right or not is a matter for the consideration of its private domestic policy: “*Les emprunts,*” Vattel says, with great pre-

(o) See next Chapter.

(p) Grotius, l. iii. c. ii. sec. vii.

cision, (a) “faits pour le service de l’Etat, les dettes créées dans l’administration des affaires publiques, sont des contrats de droit étroit, obligatoires pour l’Etat et la nation entière. Rien ne peut la dispenser d’acquitter ces dettes-là. Dès qu’elles ont été contractées par une puissance légitime, le droit du créancier est inébranlable.”

And he adds, anticipating a revolutionary argument of later times : “Que l’argent emprunté ait tourné au profit de l’Etat, ou qu’il ait été dissipé en folles dépenses, ce n’est pas *l’affaire de celui qui prêt. Il a confié son bien à la nation ; elle doit le lui rendre. Tant pis [*9] pour elle, si elle a remis le soin de ses affaires en mauvaises mains.”

It seems to have been in accordance with this important rule of International Law, that the following circular was addressed, in 1848, by Viscount Palmerston, the Secretary of State for Foreign Affairs, to the British representatives in foreign States :—

“Foreign Office, January, 1848.

“Her Majesty’s Government have frequently had occasion to instruct her Majesty’s representatives in various foreign States to make earnest and friendly, but not authoritative representations, in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities of those States.

“As some misconception appears to exist in some of those States with regard to the just right of Her Majesty’s Government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to inform you, as the representative of Her Majesty in one of the States against which British subjects have such claims, that it is for the British Government entirely a question of discretion, and by no means a question of International Right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing upon International Right, there can be no doubt whatever of the perfect right which the Government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the Government of another country, or any wrong which from such foreign Government those subjects may have sustained ; and if the Government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the Government of another country, the right so to require redress cannot *be diminished merely because the extent of the wrong is increased, and because instead of there being [*10] one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

“It is therefore simply a question of discretion with the British Government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.

“It has hitherto been thought by the successive Governments of Great

(a) Vattel, l. ii. c. xiv. s. 216.
Cod. l. xi. t. 29, de jure Reipublicæ.

Britain undesirable that British subjects should invest their capital in loans to foreign Governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign Governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British Government has hitherto thought it the best policy to abstain from taking up as International Questions the complaints made by British subjects against foreign Governments which have failed to make good their engagements in regard to such pecuniary transactions.

"For the British Government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign Governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by Governments of known good faith and of ascertained solvency. But nevertheless, it might happen that the loss occasioned to British subjects by the non-payment of interest upon loans made by them to foreign Governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British Government to make these matters the subject of diplomatic negotiation.

"In any conversation which you may hereafter hold with the ———
 [*11] Ministers upon this subject, you will not fail to *communicate to them the views which Her Majesty's Government entertain thereupon, as set forth in this despatch.

"I am, &c.,

"PALMERSTON." (b)

In June, 1847, Lord George Bentinck brought forward a motion in the House of Commons, "That an Address be presented to Her Majesty, humbly praying that Her Majesty may be graciously pleased to take such steps as may be deemed advisable to secure for the British holders of unpaid foreign bonds redress from the respective Governments."

In replying to Lord G. Bentinck, Lord Palmerston said: "Although I entreat the House, upon grounds of public policy, not to impose at present upon Her Majesty's Government the obligation which the proposed Address would throw upon them, yet I would take this opportunity of warning foreign Governments who are debtors to British subjects, that the time may come when this House will no longer sit patient under the wrongs and injustice inflicted upon the subjects of this country. I would warn them that the time may come when the British nation will not see with tranquillity the sum of 150,000,000*l.* due to British subjects and the interest not paid; and I would warn them that, if they do not make proper efforts adequately to fulfil their engagements, the Government of this country, whatever men may be in office, may be compelled by the force of public opinion and by the votes of Parliament to depart from that which has hitherto been the established practice of England, and to insist upon the payment of debts due to British subjects. That we have the means of enforcing the rights of British subjects I am not prepared to dispute. It is not because we are afraid of those States,

or all of them put together, that we have refrained from taking the steps to which my noble friend (Lord G. Bentinck) would urge [*12] *us. England, I trust, will always have the means of obtaining justice for its subjects from any country upon the face of the earth. But this is a question of expediency, and not a question of power; therefore, let no foreign country who has done wrong to British subjects deceive itself by a false impression, either that the British nation or the British Parliament will for ever remain patient acquiescents in the wrong, or that, if called upon to enforce the rights of the people of England, the Government of England will not have ample means at its command to obtain justice for them.”(c)

VI. The obligation of the State debtor is, if possible, yet stronger when the debt has been guaranteed by Treaty.(d) For in that case, the foreign may be entitled to a preference over the domestic creditor.

As a general rule, the proposition of Martens seems correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State.

VII. It may indeed happen, as the same author most justly observes, that the debtor State may adopt measures of domestic finances, so fraudulent and iniquitous, so evidently repugnant to the first principles of justice, with so manifest an intention of defeating the claims of its creditors, as to authorize the Government of the creditor in having recourse to measures of retaliation, reprisals, or to open war,—such measures, for instance, as the *permanent* depreciation of coin or paper money, or the absolute repudiation of debts contracted on the public faith of the country.

The epithet *permanent* is used, because it could scarcely be denied that, in case of extraordinary necessity,(e) a nation might adopt temporary measures of finance with regard to its paper money, of which the foreign creditor could not justly complain.

*But then he has a right to the observance of two conditions:— [*13]
1. That the real value of the loan be eventually paid. 2. That he be placed during the *interim* on the same footing as the domestic creditor.

VIII. The French Government, during the last war between England and France, confiscated a debt due from a French to a British subject; subsequently, an indemnity was stipulated for on the part of the French Government. When the matter was brought before the Commissioners appointed to adjust claims of this description, a question of great importance arose, namely, whether the debt was to be calculated according to the value of the currency at the time when the confiscation took place; or, there having been subsequently to the time of this confiscation a great depreciation in the French currency, whether the value should be calculated in the depreciated currency. The Commissioners held that the debt ought to be calculated according to the value at the time of the

(c) Hansard, Parl. Deb. 1847.

(d) E. g. as in the case of Greece. See Convention of 30th April, 1833, art. xii. De M. et De C. t. iv. p. 340.

(e) See also case mentioned by Vattel, l. ii. c. xii. s. 170.

confiscation. The Privy Council, on appeal, confirmed their decree.^(f) Sir William Grant, one of the greatest judges ever known in England, in delivering his judgment, observed, that this case bore no analogy to the case between a debtor and creditor, whatever might be the law^(g) in a case, where a depreciation of currency happened between the time when the debt was contracted, and when it was paid; for he said: "There is a wrong act done by the French Government: then they are to undo that wrong act, and to put the party in the same situation as if they had never done it. . . . It is not merely the case of a debtor paying a debt at the day it falls due; but it is the case of a wrongdoer who must undo, and completely undo the wrongful act he has done; and if he received the *assignats* at the value of 50*d.*, he does not make compensation by returning an *assignat* which is only worth 20*d.*:— [*14] *he must make up the difference between the value of the *assignat* at different periods."^(h)

In fact, the creditor is entitled to a *restitutio in integrum*.

IX. It is a clear maxim of International Law that the property of the subject is liable for the debts contracted by the State of which he is a member. This proposition is discussed with learning and excellent sense by Grotius. After saying that—"Mero naturæ jure ex facto alieno nemo tenetur nisi qui bonorum successor est;" and citing some remarkable passages from Seneca, "*Si quis patriæ meæ pecuniam credat, non dicam me illius debitorem, nec hoc æs alienum profitebor; ad exsolvendum tamen hoc portionem meam dabo; unus e populo non tanquam pro me solvam, sed tanquam pro patriâ conferam. Singuli debebunt non tanquam proprium, sed tanquam publici partem;*"⁽ⁱ⁾ and after observing that by the Roman Law the debts of the "*universitas*," or corporate body, were, on failure of the funds of the *universitas*, binding upon individuals, "*non (quâ) "singuli, sed quâ pars sunt universorum;*" and that the whole tenor of the later provisions of that law were adverse to the principle of hypothecating one man's property for another's debts, even for public debts; he adds in admirable language:—"Hæc quanquam vera sunt, tamen jure gentium voluntario induci potuit, et inductum apparet, ut pro eo quod debet præstare civilis aliqua societas, aut ejus caput, sive per se primo, sive quod alieno debito jus non reddendo se quoque obstrinxerit, pro eo teneantur et obligata sint bona omnia corporalia et incorporalia eorum qui tali societati aut capiti subsunt. Expressit autem hoc quædam necessitas, quod alioqui magna daretur injuriis faciendis licentia, cum bona imperantium sæpe non tam facile possint in manus venire, quam privatorum qui plures sunt. Est igitur hoc inter jura illa quæ Justinianus ait, usu exigente, et humanis necessitatibus a gentibus humanis constituta."

^(f) See the authorities on this subject collected. Story on Conflict of Laws, ss. 308—313; et vide post, *Comity*.

^(g) Vide ante, vol. i. chap. viii.

^(h) *Pilkington v. Commissioners, &c.*, 2 Knapp's Privy Council Reports, pp. 17—21.

⁽ⁱ⁾ De J. B. et P. l. iii. c. ii. ss. 1, 2.

*CHAPTER IV. [*15]

RECOGNITION.

X. CLOSELY connected with the subject of Intervention, discussed at the end of the former volume of this work, is the subject of Recognition, which is a kind of moral intervention by one State in the affairs of another.(a)

Such is the usual meaning of this term of International Jurisprudence; but it may also signify the act of acknowledgment by the State itself, from which the Province claiming its independence has revolted, of the independence of that Province.

Such, for example, were the formal Recognitions by the German Empire, in 1648 and 1654, of the Independence of Switzerland; of Holland by Spain; of Holland in 1649, and of Portugal in 1668; by Great Britain of the United States of America in 1782; by France when, in the Treaty of Paris in 1815, she recognized the independence of the kingdoms which had been seized upon and retained by her since 1790.

This Recognition is, of course, infinitely more material to the recognized State, than any act of the kind by a third power can be. But it is the latter species of Recognition that claims discussion in this place.

XI. In modern times, at least, the occasions for the application of this part of International Law can only arise.

*1. When a nation acquires by conquest a new territory, which she claims to have recognized as an integral part of her kingdom. [*16]

2. When a portion of a nation separates itself from the remainder, and claims admission as an independent community into the society of States. The principle affecting such a claim is the same, whether this portion occupy a territory on the same Continent with, and contiguous to the country from which it has revolted, or a distant colony of that country; whether it be the case of Holland and Portugal in the reign of Philip II., of Belgium in our own times, of the North American Colonies in the reign of George III., or of the South American Colonies in that of Ferdinand VII.

3. There is also the case of the Governor of an Independent State assuming a new title, of which he claims the recognition by other States.(b)

(a) Martens, t. i. l. 3, c. 2, s. 82, n. 6. De la Reconnaissance politique. Klüber, s. 23.

Oppenheim, p. 202, kap 8, s. 9, in part very good and clear.

Saalfeld, s. 30, pp. 63, 64.

Wheaton, Elem. 33, 37, 42.

Heffters, ss. 23, 29, 92.

Martens, Nouvelles Causes Célèbres, tom. i. p. 370. Cause Quatrième:—"Différends survenues en 1778, entre la Grande Bretagne et la France, au sujet de la reconnaissance de l'indépendance des Colonies Anglo-Américaines."

Vattel, l. iv. c. v. s. 68.

(b) "It is perfectly true, as has been mentioned, that the term 'recognition' has been much abused; and, unfortunately, that abuse has, perhaps, been supported

[*17] *XII. 1. The first instance belongs more properly to the part of this treatise which relates to the Rights of Belligerents, the Duties of Neutrals, and the Effects of War.

2. As to the second instance, the Recognition of a revolted Province or Colony by a State, other than that from which it has revolted, is of two kinds, Virtual and Formal.

The mere observance by a Third Power of a strict neutrality in the war between an old and a new State, especially when called upon by the former for intervention and aid, has some beneficial effect with respect to the nation which is struggling for independence. It allows impartially to both an equal rank and character as belligerents. The question of the right of Third Powers to assist either party has been already considered. (k)

XIII. If the contest be protracted, and there be any appearance of equality between the contending forces, the subsequent conduct of Third Powers, intending to remain neutral, cannot be blamed, if they proceed to a virtual Recognition of the revolted State; that is to say, if they recognise its commercial flag, and if they sanction the appointment of consuls to the ports of the new State. So far, there is a Recognition of its *de facto* existence, fully justified, perhaps indeed imperatively enjoined, by the duties of the Third Power towards its own subjects, and in no way inconsistent, according to the practice of nations, with the continued observance of neutrality between the contending parties. (l)

It was not, however, till after the struggle between Spain and her South American colonies had lasted for many, about twelve, years, that Great Britain accorded this virtual Recognition to the latter—righteously, perhaps even too scrupulously, observing the rule, of not injuring, even [*18] indirectly, *the interests of a country with which she was on terms of amity.

XIV. There is no proposition of law upon which there exists a more

by some authority: it has clearly two senses, in which it is to be differently understood. If the colonies say to the mother country, 'We assert our independence,' and the mother country answers, 'I admit it,' that is recognition in one sense. If the colonies say to another State, 'We are independent,' and that other State replies, 'I allow that you are so,' that is recognition in another sense of the term. That other State simply acknowledges the fact, or rather its opinion of the fact; but she confers nothing, unless, under particular circumstances, she may be considered as conferring a favour. Therefore, it is one question, whether the recognition of the independence of the colonies shall take place, Spain being a party to such recognition; and another question, whether Spain, withholding what no power on earth can necessarily extort, by fire, sword, or conquest, if she maintain silence without a positive refusal, other countries should acknowledge that independence. I am sure that my honourable and learned friend will agree with me in thinking, that his exposition of the different senses of the word 'recognition' is the clearest argument in favour of the course we originally took, namely, that of wishing that the recognition in the minor sense should carry with it recognition by the mother country in the major sense. The recognition by a neutral power alone cannot, in the very nature of things, carry with it the same degree of authority as if it were accompanied by the recognition by the mother country also."—Speeches of Mr. Canning, vol. v. pp. 299, 300.

(k) Vide ante, vol. i. p. 442.

Mr. Canning's Speech on the Independence of South America, vol. v. p. 295.

(l) See Petition of London Merchants, presented to the House of Commons by Sir J. Mackintosh.

Canning's Speeches, vol. v. p. 293.

universal agreement of all jurists than upon this, viz., that this virtual and *de facto* Recognition of a new State gives no just cause of offence to the old State,^(m) inasmuch as it decides nothing concerning the asserted rights of the latter. For, if they be eventually sustained and made triumphant, they cannot be questioned by the Third Power, which pending the conflict, has virtually recognised the revolted State.

XV. And here it is desirable to explain the conduct of Great Britain at a particular period, which at first sight, and to superficial readers of history, may appear inconsistent with the law just laid down.

Pending the conflict between Great Britain and her North American colonies, she complained more than once of the unneutral behaviour of France; and the declaration of the Marquis de Noailles, in 1778, to the cabinet of St. James, that France had signed “un traité d’amitié et de commerce” with “Les Etats-unis de l’Amérique septentrionale, qui sont en pleine possession de l’indépendance prononcée par leur acte du 4 Juillet, 1776,”⁽ⁿ⁾ was immediately followed by a declaration of war on the part of Great Britain against France; and, as far as that country was concerned, never was a war declared upon juster grounds.

It was declared, not on account of the mere establishment of diplomatic relations between France and the North American colonies, but, on account of the long tissue of dark and treacherous machinations which France had begun to weave, under the veil of the strongest professions of amity and goodwill, against the peace, honour, and interest of Great Britain, on the first appearance of discontent in America in 1765, and *which were brought to light by the act which has been men- [*19] tioned; the fact rests upon the unquestionable authority of the [19] *memoires*, since published, of the agents employed by the French Government to excite the rebellion in North America.^(o)

XVI. To the Virtual must succeed, in course of time, a Formal Recognition, evidenced by the sending of ambassadors, and the entering into treaties on the part of Foreign Powers, with the new State.^(p)

Speaking generally, two facts should occur before this grave step be taken, whereby the Neutral Power becomes the ally of one of the hitherto Belligerent parties.

1. The practical cessation of hostilities on the part of the old State,

(m) President Monroe’s Message, 2nd Dec. 1823; and see Speeches of Canning and Mackintosh, referred to above.

(n) Martens, *Nouvelles Causes Célèbres*, t. i. pp. 466–7—Cause Quatrième.

(o) “To those who say there is something mean and paltry in negotiating a treaty as the mode of recognition, and who would, if they were ministers, rather resign than so disgrace themselves, I will only observe, that this has been always the mode. The Minister of the United States was not admitted to the court of France till after the signature of a treaty. That was the mode of recognition in that case; but there were other circumstances attending the act, widely different from our recognition of the late Spanish colonies. France not only recognised the United States before her territory was free, and without giving the mother country any offer of precedency, but, though in amity with us at the moment, mixed up with the act of recognition a treaty of alliance with the United States to enable them to achieve their independence.”—Mr. Canning’s Speech on the Address on the King’s Speech on the opening of the Session, Feb. 15, 1822, Canning’s Speeches, vol. v. p. 322.

(p) Sir J. Mackintosh’s Speech, vol. iii. p. 448 of his *Miscellaneous Works*.

which may long precede the theoretical renunciation of her rights over the revolted member of her former dominions.

2. There should occur the consolidation of the new State, so far at least as to be in a condition of maintaining International relations with other countries; an absolute *bona fide* possession of independence, as a separate kingdom, not the enjoyment of perfect and undisturbed internal tranquillity,—a test too severe for many of the oldest kingdoms,—but there should be the existence of a Government, acknowledged by the [*20] people over whom it is set, and ready and able to acknowledge *and to prove its responsibility for their conduct when they come in contact with foreign nations;—where such a Government as this exists, the question of Formal Recognition is rather one which concerns the internal policy of other kingdoms, than a question of an International character.

XVII. But the refusal or the withholding of the consent of the old State, after the semblance of a present contest has ceased, upon the bare chance that she may one day or other recover her authority, is no legitimate bar to the complete and Formal Recognition of the new State by the other communities of the world; though it is most desirable that this Recognition should follow, and not precede that of the old State. Upon this point, both the reason of the thing, and the ancient and modern practice of nations, are quite decisive.

XVIII. It was not till nearly eighty years after the revolt of the United Netherlands, and nearly seventy years after their Declaration of Independence, that the Crown of Spain, by the Treaty of Munster, recognised (30th January, 1648) that Republic. But during that long interval every State in Europe, with the exception of Austria, recognised virtually and formally the new State of the United Provinces.(q)

The revolt of Portugal from Spain on the 1st of December, 1640, seated the Duke of Braganza on the throne of that country. It was not till twenty-six years afterwards that Spain acknowledged, by the Treaty of Lisbon, concluded on the 23rd of February, 1688, under the mediation of England, the independence of Portugal.(r)

Within a year of the proclamation by the Cortes of the Duke of Braganza, a treaty of peace and alliance was entered into between Charles I. of England and John IV. of Portugal, wherein John is mentioned, as a [*21] lawful sovereign *and the King of Castile, as a dispossessed ruler, while the King of England alleges that he is moved to conclude the Treaty “by his solicitude to preserve the tranquillity of his kingdoms, and to secure the liberty of trade of his beloved subjects.”(s)

All the European Powers recognised the Commonwealth and Protectorate of England; and in the same manner they recognised Charles II.,

(q) Dumont, vol. vi. p. 429, vol. v. p. 507.

Sir James Mackintosh's Speech on the Recognition of the Spanish American States, vol. iii. pp. 444-5. Miscell. Works.

Schmauss, Corp. J. G. num. cxxv-vi-vii. pp. 614-30.

(r) Dumont, vol. vii. p. 238.

(s) Dumont, vol. vi. p. 238.

Sir J. Mackintosh, vol. iii. pp. 446-7.

who acknowledged the binding force of all the treaties concluded during the time of the Republic in England.

On the other hand, the Recognition of the son of James II. of England, after the death of that exiled monarch, was justly resented by Great Britain as a gross insult and flagrant violation of the Law of Nations. The Father of the Prince so recognised had not been acknowledged or obeyed in England, but had been declared by the solemn resolution of the nation to have abdicated the throne of that country. This Recognition therefore led immediately to the formation of the Grand Offensive and Defensive Alliance between England, Holland, and the Emperor of Germany against France and Spain.^(t)

The Recognition of the North American States by France in 1778, and the peculiar circumstances attending it, which induced Great Britain to consider such an act as a *casus belli* against France, has been already adverted to.

XIX. It has been stated in the foregoing pages^(u) that the refusal of Great Britain to recognise the Republic of 1792, was expressly grounded upon the monstrous proclamation which the French authorities promulgated at that time. Great Britain recognised, in common with the other European Powers, the Consulate in France, at the Peace of Amiens ^{*}(1801,) and was the only Power which did not recognise the [*22] Empire.

On March 25th, 1825, Mr. Canning replied to the remonstrance of the Spanish minister with respect to the Recognition (at that time only virtual) by Great Britain, of the South American Republics, in the following remarkable words:—

“The example of the late revolution in France, and of the ultimate happy restoration of His Majesty Louis XVIII., is pleaded by M. Zea in illustration of the principle of unextinguishable right in a legitimate Sovereign; and of the respect to which that right is entitled from all Foreign Powers; and he calls upon Great Britain, in justice to her own consistency, to act with the same reserve towards the New States of Spanish America, which she employed, so much to her honour, towards revolutionary France.

“But can M. Zea need to be reminded that every Power in Europe, and specifically Spain amongst the foremost, not only acknowledged the several successive Governments, *de facto*, by which the House of Bourbon was first expelled from the throne of France, and afterwards kept for near a quarter of a century out of possession of it, but contracted intimate alliances with them all; and above all, with that which M. Zea justly describes as the strongest of *de facto* Governments—the Government of Bonaparte; against whom not any principle of respect for the rights of Legitimate Monarchy, but his own ungovernable ambition, finally brought combined Europe into the field?

“There is no use in endeavouring to give a specious colouring to facts, which are now the property of history.

(t) Sir J. Mackintosh, vol. iii. pp. 446-7.

Mémoires de St. Simon, t. iii. p. 228.

(u) Vol. i. p. 435.

"The undersigned is, therefore, compelled to add, that Great Britain herself cannot justly accept the praise which M. Zea is willing to ascribe to her in this respect, nor can she claim to be altogether exempted from the general charge of having treated with the Powers of the French Revolution."

"It is true, indeed, that, up to the year 1796, she abstained from [*23] treating with revolutionary France, long after other *Powers of Europe had set her the example. But the reasons alleged in Parliament, and in State Papers, for that abstinence, was the unsettled state of the French Government. And it cannot be denied that, both in 1796 and 1797, Great Britain opened a negotiation for peace with the Directory of France—a negotiation, the favourable conclusion of which would have implied a recognition of that form of Government; that in 1801 she made peace with the Consulate; that if, in 1806, she did not conclude a treaty with Bonaparte, Emperor of France, the negotiation was broken off merely on a question of terms; and that if, from 1808 to 1814, she steadily refused to listen to any overtures from France, she did so, declaredly and notoriously, on account of Spain alone, whom Bonaparte pertinaciously refused to admit as party to the negotiation.

"Nay, further, it cannot be denied that, even in 1814, the year in which the Bourbon dynasty was eventually restored, peace would have been made by Great Britain with Bonaparte, if he had not been unreasonable in his demands; and Spain cannot be ignorant that, even after Bonaparte was set aside, there was question among the allies, of the possible expediency of placing some other than a Bourbon on the throne of France.

"The appeal, therefore, to the conduct of the Powers of Europe, and even to that of Great Britain herself, with respect to the French Revolution, does but recall abundant instances of the recognition of *de facto* Governments; by Great Britain, perhaps later, and more reluctantly, than by others, but by Great Britain herself, however reluctant, after the example set to her by the other Powers of Europe, and specifically by Spain."(x)

XX. The Revolution which seated Louis-Philippe upon the throne of France in 1830, and the Revolution which ejected him in 1848 and set [*24] up a Republic, and the Revolution *which committed the Government of that kingdom to the present Emperor, were equally recognised by England and by other European Powers.

The formal Recognition of the South American Republics by Great Britain took place in 1825, and under the negotiation of a treaty of commerce, while they were yet unacknowledged by the mother country.(y)

(x) State Papers, vol. xii. pp. 913–14.

(y) See Mr. Canning's Speeches, vol. v. p. 323.

"Extensive commercial intercourse having been established for a series of years between the dominions of his Britannic Majesty and the territories of the United Provinces of Rio de la Plata, it seems good, for the security as well as encouragement of such commercial intercourse, and for the maintenance of good understanding between his said Britannic Majesty and the said United Provinces, that the relations now subsisting between them should be regularly acknowledged and confirmed by the signature of a treaty of amity, commerce, and navigation.

The formal Recognition of Greece as an absolutely independent Power, may be said not to have definitively taken place till May, 1832. But on the 6th of July, 1827, France, Great Britain, and Russia interposed, in order to guarantee a *quasi* independence to Greece, and covenanted by a secret and additional article to send consular agents, and enter into commercial relations within a month from the date of the treaty, whether the Porte consented to or refused its conditions.(z)

The formal Recognition of Belgium, as has been already stated, took place without the consent of Holland.

“Placuit gentibus,”(a) then, both in theory and practice, to recognise after the lapse of a reasonable period of time new States that have, *de facto*, achieved an independent existence, whether the original mother countries have or have not acquiesced in this order of things.(b)

*It has been said that to refuse Recognition, while the issue is at all doubtful, or the conflict not wholly abandoned, is not [*25] an offence against the Law of Nations;(c) at the same time it may often border upon an injury, as may the recalling of an ambassador, which is yet by itself no *casus belli*.

XXI. It is well remarked by Hegel, that when Napoleon, before the Peace of Campoformio, said, “The French Republic no more needs recognition than the sun requires to be recognised,” he expressed in these words nothing more than the strength of the existing fact, which carried with it a practical recognition, whether expressed in language or not.(d)

Nevertheless, Recognition is a right which other States are under an obligation to render, in such a case, for various reasons; and amongst others this reason should be mentioned, namely, that the effect of non-Recognition places the subjects of the revolted province in a very disadvantageous position, with respect to the municipal tribunals of other countries. It is a firmly established doctrine of British and North American, and indeed of all jurisprudence, that it belongs exclusively to Governments to recognize new States; and that until such recognition, either by the Government of the country in whose tribunals a suit is brought, or by the Government to which the new State belonged, Courts of Justice are bound to consider the ancient state of things as remaining unaltered.

XXII. Thus, in *The City of Berne in Switzerland v. The Bank of England*, it was decided that a Judicial Court cannot take notice of a foreign Government not acknowledged by the Government of the country in which that Court sits, and that the fact of acknowledgment is matter of public notoriety.(e)

“For this purpose they have named their respective plenipotentiaries, that is to say,” &c.—*Treaty of Amity, Commerce, and Navigation, between His Majesty and the United Provinces of Rio de la Plata*. Signed at Buenos Ayres, February 2, 1825 (Presented to Parliament, May 16, 1825.)

(z) De M. et De C. t. iv. pp. 104, 339.

(a) See vol. i. p. 39.

(b) *Papers relative to the Affairs of Greece*: Published in London. 1835.

(c) Oppenheim. p. 213.

(d) Hegel, *Naturrecht und Staatswissenschaft*; Werke, b. viii. s. 331. (Ed. Berlin, 1840.)

(e) 9 Vesey, Rep. p. 347.

[*26] And in *Dolder v. The Bank of England*, the Court refused *to order dividends, received before the bill filed, of stock purchased by the old Government of Switzerland, to be paid into Court by the trustees, on the application of the present Government, without having the Attorney-General a party.(f)

In the case of *Thompson v. Powles*, it appeared that a revolted colony of Spain, not recognized as an independent State by Great Britain, executed bonds at six per cent. interest, as securities for a loan. P., acting in collusion with B., a holder of the bonds in England, by falsely representing that he had purchased some of them, induced the plaintiff to become a purchaser; and it was held, on demurrer, that the bonds were not usurious, as it did not appear, by the bill, that the contract for the loan was made, or the amount of it to be paid in this country; that P. and B. would have been answerable to the plaintiff for losses sustained upon his purchase; but that, as the original contract was made with a Government not acknowledged by Great Britain, the Court could not relieve him.(g)

In *Taylor v. Barclay*,(h) it also appeared that, to prevent a demurrer to a bill, it was falsely alleged in it that a revolted colony of Spain had been recognized by Great Britain as an independent State: the Court held itself bound to know, judicially, that the allegation is false, and not to give it the intended effect.

So in the case of *The Manilla*, ports and places of St. Domingo, not in possession of the French, were excepted out of the general character of the island as an enemy's colony, since the Orders in Council had recognized them as open to *British* trade.(i)

In the United States of North America a similar doctrine has been held. It has been laid down by their Courts that *it is the [*27] exclusive right of Governments to acknowledge new States arising in the revolutions of the world; and until such Recognition by their Government, or by that to which the new State previously belonged, the judicial presumption must be that the ancient order of things remains unchanged.(k)

The same Government has held that when a civil war rages in a foreign nation, one part of which separates itself from the old established Government, and erects itself into a distinct Government, the Courts of the Union must view such newly constituted Government as it is viewed by the legislative and executive departments of the Government of the United States.(l)

(f) 10 Vesey, 352; 11 Vesey, 283.

(g) 2 Simon's Rep. 194.

(h) *Ib.* 213.

(i) *The Manilla*, 1 Edwards' Admir. Rep. 1.

The Manilla, 2 Dodson, 363.

Yrisarri v. Clement, 3 Bing. 432.

(k) *Gelston v. Hoyt*, 3 Wheaton's (Americ.) Rep. p. 324.

(l) *The United States v. Palmer*, *ib.* p. 634.

Rose v. Himely, 4 Cranch's (Americ.) Rep. 241.

Oppenheim, pp. 212-13.

Wheaton's Elem. pp. 98-99.

See also Debate on Foreign Enlistment Bill, June 10th, 1819.—Hansard, Parl. Deb. vol. xii., especially Speeches of Sir J. Mackintosh and Mr. Canning.

XXIII. 3. The third instance, viz. the case of the Governor of an independent State assuming a new title, and claiming the Recognition of it, remains to be considered.

It is unquestionably competent to every sovereign ruler to assume any title of dignity or authority, which it may please him to adopt, or the nation to confer upon him. Formerly, indeed, the German Emperors claimed to be considered, in their alleged capacity of successors of the Roman Emperors, as universal sovereigns and chiefs of the Christian world, and to enjoy exclusively the title of "Majesty."^(m)

*Even towards the end of the fifteenth century, after this extravagant pretension had ceased, they still, for some time, [*28] claimed to be considered as the first among the crowned heads, then admitted to be their equals. But Napoleon attempted in vain to clothe the title of Emperor with the character of a higher class of sovereignty than that of simple monarchy. All the European kingdoms have long ago determined that the Crown is Imperial in every country where the ruler is a king.

The Emperors of Germany were not without a rival to their pretensions when these were at the highest; for till the beginning of the sixteenth century the Popes arrogated to themselves the right of conferring all distinctions of title and rank upon the rulers of all the kingdoms of the earth.⁽ⁿ⁾

XXIV. But although rulers may assume what titles they please, there lies no obligation upon other States to recognize any changes in the accustomed forms and appellations, which usage and convenience have hitherto sanctioned.^(o) Nevertheless comity and the reason of the thing would induce other rulers to grant such Recognition,^(p) except in the following instances:—

1. Where the new title assumed is in opposition to or derogation from existing rights or pretensions of the rulers of other States.^(q)

2. Where it introduces new obligations by way of concession, or otherwise, with respect to other States.

3. Where it tends to lower the dignity and degrade the character of the title already borne by the rulers of other States.^(r)

*These objections, and especially the last, apply only to the novel assumption of a title: for if its assumption has been sanc- [*29]

(m) Duck, de Usu et Auctoritate Juris Civilis, who wrote in the time of Charles I., combats this pretension.

Vattel, l. ii. c. iii. s. 34.

Schmalz, c. 36, s. 18.

Saalfeld, p. 182.

Heffters, p. 53, c. vi. s. 29.

Mably, t. i. p. 213.

Klüber, ss. 107–112.

(n) Saalfeld, p. 37, s. 18.

Vattel, l. ii. c. iii. s. 45.

Heffters, l B. 29, n. 4.

(o) Martens, s. 128.

Saalfeld, 37.

(p) Schmalz, p. 183.

(r) Vattel, l. ii. c. iii. s. 44.

Heffters, l B. 29.

(q) Mably, i. 213, ii. 157.

tioned by time and usage, however inapt and ridiculous, it cannot be lawfully refused by other nations.^(s)

XXV. As the object for which a ruler or a nation assumes a new title would be practically defeated, unless it obtained the sanction of other Powers, it has been the usual practice to obtain the promise of their Recognition beforehand, either by private Recognition or public Treaty.

Frederic I., King of Prussia, obtained the consent of the Emperor of Germany before he assumed the royal title in 1700—a title afterwards formally recognised by every European State,^(t) though not by the Pope till 1786.^(u)

The Czar, Peter the Great, obtained the Recognition of his title as Emperor, first by private negotiation and then by solemn provisions of treaty; as, for instance, by treaty with the Porte in 1739, with Great Britain in 1742;^(x) the latter Power, however, expressly stipulating that [*30] by *such Recognition, it intended to convey no pre-eminence whatsoever over herself.

But Great Britain had already recognised the title *de facto*, and Prussia never made any difficulty about doing so; Sweden recognised it in 1723, Venice in 1726, Denmark in 1732, Charles VII., Emperor of Germany, in 1744; Francis I., in 1748, and also the *Russian Empire*. Poland did not recognise it till 1764, and then under conditions that the Empress Catherine II. should lay no claim to *Red Russia*.

In 1745 this matter assumed a shape which afterwards led to a curious diplomatic negotiation, for France and Spain in that year refused to recognise the title, without obtaining a pledge, in the shape of *litteræ reversales* (*réversales*) that the Recognition should not carry with it any change in the accustomed ceremonies of the Courts. Spain obtained the *réversale*; but France had not succeeded in obtaining it as late as 1762, when she in consequence refused Peter III. the title of Emperor: it was at last obtained by her, but again questioned, at the succession of Catherine II. a few months afterwards; but the matter was finally adjusted.^(y)

(s) Vattel, l. ii. c. iii. s. 44.

(t) Martens, l. iv. c. 2, s. 128. De la Reconnaissance des Titres et Dignités, n. b.

(u) Klüber, 107, n. c.

(x) Martens, ib. Ompteda, t. ii. p. 508.

“Weilen Ihre Britannische Majest. Ihre Kayserlichen Maj. von allen Reussen einen distinguirten Beweiss Ihrer Freundschaft und Hochachtung zu geben wünschen, so wollen dieselben hiermit, durch den gegenwärtigen separirten Artikel, Sr. Kayserl. Majest. von allen Reussen mehrmahls geäussertem Verlangen gemäss, Ihre und Ihrer Nachfolger auf dem Kayserlichen Russischen Thron Kayserwürde erkennen, und denenselben den Titel davon zugestehen; jedoch mit dieser ausdrücklichen Bedingung, dass Ihre Kayserl. Majest. aller Reussen und Dero Nachfolger niemahlen, wegen dieser Würde und dieses Titels, einigen Vorzug oder Vorrang, auf welche Art es seyn mag, fordern sollen, und dass diese Anerkennung weder jetzt noch künftig die geringste Veränderung in dem Ceremoniel, das bisher in Ansehung des Rangs unter den Ministris besagter Ihrer Kayserl. und Britannischen Majest. oder sonst auf irgend eine Art, sowohl an Ihren eigenen Höfen, als an andern, wo Sie, respective, Ministros haben, beobachtet worden ist, nach sich ziehen soll.”—*Fœdus inter Russiam et Magnam Britanniam*, a. 1742 (Separirter Artikel;) Wenck. Cod. Jur. Gent. tom. i. pp. 670–1.

(y) Martens, Causes Célèb. t. ii. p. 89—Cause Deuxième.

XXVI. The title of Emperor of the French, adopted by Napoleon in 1804, was recognised by every State in Europe except Great Britain.

At the dissolution of the German Empire, in 1806, the title of Emperor of Austria was universally recognised. One of the consequences of the Confederation of the Rhine was the assumption of new titles by old Potentates. The ancient Electors of Bavaria, Saxony, and Wirtemberg, became Kings; the ancient Elector of Baden, and the Landgrave of Hesse-Darmstadt, became Grand Dukes; and the Prince of Nassau a Duke; all which titles were recognised by the Treaties of Paris (1814) and of Vienna (1815.) Among the Recognitions of new titles at the Congress of Vienna were,—the ancient Elector was recognised as King of Hanover,^(z) and *the Dukes of Mecklenburgh, Weimar, and Oldenburgh^(a) as Grand Dukes; the Emperor of Russia as King [*31] of Poland.^(b)

On the other hand, the five great Powers, assembled at the Congress of Aix-la-Chapelle in 1818, unanimously resolved to refuse the Recognition of a new title of King, which the Elector of Hesse at that time had indicated his intention to adopt; grounding such refusal, among other reasons, upon the consideration, that the title adopted by a ruler was not a question of mere etiquette, but was a fact connected with important political relations.^(c)

*In making this refusal, they were justified by the express authority of Vattel,^(d) who observes, “Comme il serait ridicule [*32] à un petit prince de prendre le nom de roi et de se faire donner de la *majesté*, les nations étrangères, en se refusant à cette fantaisie, ne feront rien que de conforme à la raison et à leurs devoirs.”

(z) Art. xxvi.

(a) Art. xxvii. xxxiv.—xxxvi.

(b) Art. i.

(c) “Protocole séparé. Séance du 11 Octobre, 1818, entre les cinq puissances:

“La conférence aiant été informée de l'intention de Son Alt. Roiale, Electeur de Hesse, de prendre le titre de Roi, et aiant pris connaissance des lettres adressées par ce prince aux souverains pour obtenir leur consentement à cette démarche:

“Les Ministres des cinq Cabinets réunis à Aix l. Ch., prenant en considération que le but de leur réunion est celui de consolider l'ordre actuel des choses, et non pas de créer de nouvelles combinaisons, considérant de plus que le titre porté par un souverain n'est pas un objet de simple étiquette mais un fait tenant à des rapports essentiels et à d'importantes questions politiques, sont d'avis, qu'en leur qualité collective ils ne sauraient prononcer sur cette demande; pris séparément les Cabinets déclarent, qu'attendu que la demande de S. A. R. Electeur de Hesse n'est justifiée par aucun motif satisfaisant, il n'y a rien qui puisse les engager à y accéder.

“Les Cabinets prennent en même tems l'engagement de ne reconnaître à l'avenir aucun changement ni dans les titres des souverains ni dans ceux de princes de leurs maisons sans en être préalablement convenus entre eux.

“Ils maintiennent ce qui a été statué à cet égard jusqu'ici par des actes formels. Les cinq Cabinets appliquent explicitement cette dernière reserve au titre d'Altesse Roiale, qu'ils n'admettront désormais que pour les chefs des maisons Granducales, l'Electeur de Hesse y compris, et pour leurs héritiers présomtifs.

“Sign. METTERNICH, RICHELIEU, CASTLEREAGH, WELLINGTON, HARDENBERG, BERNSTORFF, NESSELRODE, CAPO D'ISTRIA.”

—Traité de Diplomatie, t. i. p. 357. Comte de Garden; Meisel, Cours de Stile Diplomati.: Dresd. 1824, t. ii. p. 593; referred to by Heffters, 1 B. s. 29, p. 54.

(d) L. ii. c. iii. s. 44.

OCTOBER, 1855.—4

[*33]

*CHAPTER V.

RIGHT TO EXTERNAL MARKS OF HONOUR AND RESPECT.

XXVII. THERE is a natural Equality among States as among Individuals; and it is as repugnant to the nature of a State as of a Person to be in a condition of servitude to the will of another.(a)

This natural Equality of States is the necessary companion of their Independence—that primitive cardinal right, upon which the science of International Law is mainly built.

States, considered absolutely and apart from their condition as a member of the great society of nations, are entitled to the full enjoyment of a free moral individual personality—when considered practically and with relation to that society, they are entitled, in their intercourse with other States, to all the rights incident to a natural Equality.(b)

[*34] No other State is entitled to encroach upon this Equality *by arrogating to itself peculiar privileges or prerogatives, as to the manner of their mutual intercourse.

The relation of natural Equality is, in its character, essential, and incapable of being affected by any accidental attributes of another State, such as its greater extent of territory, the larger number of its inhabitants the superiority of its resources, the form of its constitution, the title of its executive, or the remoter antiquity of its origin. All privileges claimed upon these or similar pretexts, are, for so much, derogations from the natural Equality of other States.

It is impossible to foresee how soon any departure from this rule may injuriously affect the liberty and independence of the State which submits to it. Hence the real value of those external marks of honour and respect so carefully embodied in the ceremonies and etiquette of nations, but which have been, it must be confessed, often carried to an extent in which a sober regard for the true end was lost in an idle unreflecting attachment to the means, or under pretence of which the unlawful object of fostering ambition has been substituted for the lawful object of securing independence.

Nevertheless, it has been said with equal truth and beauty,—“The

(a) Martens, t. i. s. 125. c. 2.

Vattel, l. ii. c. iii., De la Dignité et de l'Egalité des Nations, de leurs Titres et autres Marques d'Honneur.

Ib. l. i. c. xxv. s. 191., De la Gloire d'une Nation.

Wheaton's Elem. i. c. 3.

Klüber, Recht der Gleichheit, Erster Theil, Drittes Capitel.

Günther, i. 266.

Heffters, ss. 34, 103, 31.

Mackintosh, Miscellaneous Works, vol. iii. p. 468.

(b) Martens expresses the principle upon which this right is founded clearly and forcibly:—“Une nation, quelque puissante qu'elle puisse être, n'est pas en droit d'exiger de l'autre des démonstrations positives d'honneur, moins encore des préférences, quoique toutes soient autorisées à considérer comme *lésion* des démonstrations positives de *mépris* et des *actes contraires à leur honneur*.”—Dr. des Gens, s. 125.

king's honour is that of his people. Their real honour and interest are the same. A clear, unblemished character, comprehends not only the integrity that will not offer, but the spirit that will not submit to, an injury; and whether it belongs to an individual, or to a community, it is the foundation of peace, of independence, and of safety. Private credit is wealth; public honour is security. The feather that adorns the royal bird, supports his flight; strip him of his plumage, and you fix him to the earth.”^(c) “A wrong done” (said the high authority of Sir James Mackintosh) “to the humblest British subject, an insult offered to the British flag flying on the slightest skiff, is, if unrepaired, a dishonour to the British nation.”^(d) And *in the sober language of Vattel: [*35] “Puisque la gloire d’une nation est un bien très-réel, elle est en droit de la défendre, tout comme ses autres avantages. Celui qui attaque sa gloire lui fait injure; elle est fondée à exiger de lui-même, par la force des armes, une juste réparation. On ne peut donc condamner les mesures que prennent quelquefois les souverains, pour maintenir ou pour venger la dignité de leurs couronnes. Elles sont également justes et nécessaires. Lorsqu’elles ne procèdent point de prétentions trop hautes, les attribuer à un vain orgueil, c’est ignorer grossièrement l’art de régner, et mépriser l’un des plus fermes appuis de la grandeur et de la sûreté d’un état.”^(e)

This end, therefore, is always to be kept in view—namely, that the honour of a nation is an outwork of the citadel of its independence. Independently, however, of this consideration, every State, like every individual, has a substantive right to maintain and preserve its reputation.

XXVIII. Perhaps this right will obtain its best general exposition from a consideration of the acts which have been treated as an invasion of it—of wrongs done with respect to it. They seem to admit of the following classification:—1. Insults offered to the Head or Executive Power of a State, through the official organs of another State. 2. Through the acts of a subject of another State.

XXIX. Among the first class are to be reckoned injurious and insulting proclamations put forth by the Government of a country, or by its representative abroad. Among the second, libels published by private subjects upon the Executive Power of another State. Insults offered by individual subjects of another State, not recognised by, or, if need be from any peculiarity in the circumstances, disavowed by the State of which he is a member, can, generally speaking, be scarcely held to justify an International complaint; but in our own country, and at no very distant period, as has been already stated, the Crown has prosecuted subjects guilty of libelling *Sovereigns with whom it was in amity;^(f) and it is [*36] the bounden duty of every State to make reparation for injuries inflicted upon the ambassador of any Foreign Power residing at its Court.

International Law forbids a libel upon a State, for the same reason that Municipal Law forbids a libel upon an Individual. The Individual

(c) Letters of Junius, xlii.

(d) Speech on the Recognition of the Spanish American States, vol. iii. p. 468.

(e) Vattel, t. i. l. i. ch. xv. s. 191.

(f) Vide ante, vol. i. p. 417.—Prosecutions for libelling the Emperors of Russia and France.

is injured thereby in his social rights, in his relation to other individuals : the State, which has been recognised as a member of the society of societies, is also injured thereby in its relation to other societies.

But in the latter, as well as the former case, this right is not invaded by a free discussion of, and criticism upon, the external acts of the State or the Individual. A state has no cause of complaint if she has the same protection as an Individual. The Courts of Justice are open in both cases for the vindication of the offended party, and the reparation of the injury, but in neither case can the acts of the wrong-doer be exempted from the free censure of an independent judgment, and it is nobly said by Heffters, "When shall Falsehood cease, if it be allowed to usurp the place of Truth among those who carry on the History of the world?"(g)

Here, as in other instances, the doctrine of the Roman Law(h) is perfectly applicable to States: "Eum, qui nocentem infamavit, non esse bonum et æquum ob eam rem condemnari; peccata enim nocentium nota esse, et oportere, et expedire;"(i) and again, "si non convicii consilio te aliquid injuriosum dixisse probare potes, fides veri a calumniâ te defendit."(k)

XXX. A State may confer on its Governors any title of dignity it pleases,(l) and when this title has been used and *recognised, it [*37] will not allow another State to communicate with it by any other mode of address.(m) The general remarks of Vattel on this point, and the particular instance of Prussia by which he supports them, are well deserving of attention.—"Les titres, les honneurs ne décident de rein, il est vrai; vains noms, vaines cérémonies, quand ils sont mal placés; mais qui ne sait combien ils influent dans les pensées des hommes? C'est donc ici une affaire plus sérieuse qu'elle ne le paraît au premier coup d'œil. La nation doit prendre garde de ne point s'abaisser elle-même devant les autres peuples, de ne point avilir son conducteur par un titre trop bas: elle doit se garder plus encore de lui enfler le cœur par un vain nom, par des honneurs démesurés, de lui faire naître la pensée de s'arroger sur elle un pouvoir qui y réponde; ou d'acquérir, par d'injustes conquêtes, une puissance proportionnée. D'un autre côté, un titre relevé peut engager le conducteur à soutenir avec plus de fermeté la dignité de la nation. Les conjonctures déterminent la prudence, et elle garde en toutes choses une juste mesure. *La royauté*, dit un auteur respectable, et qui peut en être cru sur la matière, *la royauté tira la maison de Brandebourg de ce joug de servitude où la maison d'Autriche tenait alors tous les princes d'Allemagne. C'était une amorce que Frédéric I^{er} jetait à toute sa postérité, et par laquelle il semblait lui dire: 'Je vous ai acquis un titre, rendezvous en digne; j'ai jeté les fondements de votre grandeur, c'est à vous d'achever l'ouvrage.'*"(n)

XXXI. This matter has already undergone some discussion in the preceding Chapter.

(g) Heffters, ss. 31, 111; and see authorities cited at the beginning of this Chapter.

(h) Inst. iv. 4. Cod. ix. 35. Dig. xlvii. 10. De injuriis et famosis libellis.

(i) Dig. xlvii. 10, 18.

(k) Cod. ix. 35, 5.

(l) Vattel, l. i. c. iii. ss. 41, 42, 43, and note.

(m) Martens, Droit des Gens, s. 125.

(n) Vattel, t. i. l. ii. ch. iii. s. 41.

Any injury done or insult offered to the outward *insignia* of a State's personality are violations of the Right of which we are treating; for instance, counterfeiting the coin, debasing its value by alloy, (*o*) usurping the heraldic arms, as Mary Queen of Scots did those of the Queen of England; assuming the title, as the British kings, [*38] long after all pretext for it had ceased, injuriously continued to assume the title of King of France. (*p*) Last, though by no means least, insults offered to the nautical flag, the emblem of the national life, are all invasions of the Right to Honour and Respect for which satisfaction may be demanded and reparation ought to be made. The sensitiveness of all nations to any insult offered to their flag has always been very tender; such an indignity has been always held to call for speedy atonement and full reparation.

In 1784, the Emperor of Austria attempted, in violation of the existing law, to open the navigation of the Scheldt; and sent a brig, bearing the Imperial Flag, from Ostend to Antwerp, with orders to ascend that river. The ship refusing to go back to sea when ordered to do so by the commander of a Dutch ship of war, was fired upon and compelled to anchor. The Emperor withdrew his ambassador from Holland, "*devant considérer l'insulte faite à son pavillon comme une déclaration de guerre*," (*q*) and demanded "*une satisfaction éclatante*." The Dutch made an ample apology for this alleged insult, (*r*) though it does not seem that under the circumstances any apology was fairly due.

When in 1849 (*s*) Austria stated the grievances which had induced her to withdraw her ambassador from Rome, she enumerated among them that "the Austrian flag and the arms of the empire, on the palace of our ambassador at Rome, were insulted and torn down; and although the Holy Father himself condescended to express to the ambassador his deep concern at this gross violation of International *Rights, yet his government was overawed by the licentiousness of faction, [*39] and unable to make reparation for the injury which was done."

The flag and the arms were, on the restoration of the Pope, put up again with due honours on the part of the Roman authorities.

XXXII. "*Ut belli occasio evitetur tractandum quoque, quando et quorum navibus præstanda sit reverentia*," (*t*) is the language with which the great Dutch jurist opens the once much-vexed subject of Maritime Ceremonials: his reason for discussing a subject, upon which his authority is perhaps the greatest, being, that war may be prevented, into

(*o*) Ibid. t. i. l. i. ch. x. s. 108. "Des principes que nous venons d'établir, il est aisé de conclure, que si une Nation contrefait la monnaie d'une autre, ou si elle souffre et protège les faux monnayeurs qui osent l'entreprendre, elle lui fait injure."

(*p*) George III. first discontinued it.

(*q*) Martens, Causes Célèbres, t. ii. p. 242.

(*r*) Ib. 270, 271.

(*s*) Ann. Register, vol. xci. p. 296, A. D. 1849.

(*t*) Bynkershoek, De Dominio Maris, cc. ii. iv. Quæst. Jur. Publ. l. ii. c. xxi. This is the leading authority upon this subject.

Vattel, l. ii. ch. iv. 38.

Martens, ss. 158, 163.

Klüber, ss. 117—122.

Wheaton, Elem. i. ch. iii. 7, p. 155.

the horrors of which his own country had more than once been plunged by disputes upon this point of International honour.

Maritime ceremonials, in time of peace, are either—1. Recognition of sovereignty; or 2. Marks of conventional courtesy or comity. These acts of comity, like all others (as has been already observed,) sometimes assuming, through the force of treaty or long usage, the character of positive law.

They are paid to ships of war; to ports, fortifications, harbours; to Sovereigns, or the Representatives of Sovereigns; independent States, monarchical or republican.

They consist in striking the flag (*supparum et summi aplustris submissio*—*salut du pavillon*—*der Flaggenstreichen*;) lowering top-sails and striking flag; lowering the sails (*velorum demissio*—*salut des voiles*—*das Segelstreichen, die Lösung*;) firing a certain number(*x*) of guns (*salut du cannon*—*Lösung der Canonen*.)

[*40] *XXXIII. 1. Maritime ceremonials can only be claimed as Recognition of Sovereignty where the sea is subject to the sovereign who claims them, that is to say, within cannon-shot of the shore, and within those parts of the sea already treated of in a former Chapter.(y)

To these should be added, that portion of the sea which is actually occupied by a fleet; that portion is, during the actual period of the occupation, under the dominion of the State represented by the fleet; as the temporary occupation of foreign territory by an army places it for the time under the occupation of the State which the army represents.

In the twenty-first chapter of his second book, *Quæstiones Juris Publici*, Bynkershoek, referring to his former work, *De Dominio Maris*, and the thesis, “nullum mare exterum nunc esse in cujusquam Principis dominio, cum nullum a quoquam Principe possideatur,” therein successfully maintained, observes, “his omnino consequens est, qui imperat mari proximo rectè etiam imperare, ut et quemadmodum ibi salutetur.”

Thus the Dutch States (A. D. 1690,) “*optimo jure*,” decreed that the King of Denmark’s demand with respect to the salutation of the fortress of Cronenburg in the Baltic should be complied with; and, “*nec minus rectè*,” in 1671 decreed that their naval commanders should salute, when they came within cannon-shot of a State, according to the manner prescribed by that State, whether their salute was or was not returned; “*quemque enim esse dominium in suo imperio et quemquam advenam ibi subditum*.”(z)

(x) The number is generally equal; Sweden, it is said, alone firing an unequal number.—Martens, s. 158, n. The exact number has been often the subject of dispute, and has generally been settled by the express provisions of Treaty with the Barbary States: e. g., Spain and Tripoli (1784,) Great Britain and Tripoli (1694 and 1746,) United States of North America and Tripoli (1805,) Great Britain and Tunis (1746—1751,) Holland and Tripoli (1728,) France and Tripoli (1793,) France and Morocco (1767.)

(y) Vide ante, vol. i. cc. 4, 6, 7, 8.

(z) S. 23, t. i. Legum Nauticarum, cited by Bynkershoek, ib.

Martens, l. iv. ch. iv. s. 159, note b. “Les instructions des puissances pour leurs armées navales jettent le plus grand jour sur leurs prétentions à l’égard de ce cérémonial. Sur l’Espagne, voyez les ordonnances de Philippe IV. de 1563, dans

*The order of Philip II. (A. D. 1563), that the flag bearing the Imperial arms should not be lowered in any foreign port, [*41] and the act of the French ship which passed the Genoese citadel in 1691, without saluting, were both, according to Bynkershoek, violations of International Law.

XXXIV. 2. Maritime ceremonials in the open sea, or in any other places than those subject to the dominion of a State, must depend upon Comity, or mutual agreement. Zouch,^(a) with that correct opinion upon the principles of International Law which distinguished him, applauds the decision of the superior French Court which reversed the sentence of an inferior court for condemning a Hamburg vessel which had refused to salute a French ship in the Spanish seas. Bynkershoek of course sanctions this opinion. According to usage,^(b) however, merchant vessels are obliged to salute a vessel of war generally by cannon-shot, and also by lowering flag and sails;—the salute by sails is the most usual.^(c) Ships of war of equal rank are not constrained by custom to salute at all: those of inferior ought to salute those of superior rank. A single ship of war salutes a fleet or squadron; and an auxiliary squadron salutes the principal fleet.

*XXXV. By an Ordonnance of the King of the French, 1831, (1st July), the following rules of Maritime Salute are [*42] prescribed for French ships of war:—

“Art. II. Toutes les fois qu’un bâtiment Français sera salué par un bâtiment de guerre étranger, le salut sera rendu coup pour coup audit bâtiment étranger, quels que soient les grades des officiers commandants, et soit qu’il ait été traité ou non de salut, pourvu toutefois que ce salut n’excède pas 21 coups de canon.

“Art. III. Les commandants des bâtiments de guerre Français arrivant sur une rade étrangère, se conformeront, quant aux visites, aux usages généralement reçus dans le pays où ils se trouveront.”^(d)

XXXVI. The following orders are issued by the British Crown to her ships of war, with respect to saluting the flags of other Powers at sea.

“All salutes from ships of war of other nations, either to Her Majesty’s forts or ships, are to be returned gun for gun.

“A British ship or vessel of war meeting at sea a foreign ship of war bearing the flag of a flag-officer, or the broad pendant of a commodore commanding a station or squadron, and superior in rank to the officer of

Abreu y Bertodano, Collection; de Philippe IV. de 1664, *ibid.* p. vii. p. 642; de Carl. II. de 1671, *ibid.* p. i. p. 549; sur l’Angleterre, Laws of the Admiralty, t. ii. p. 303; sur la France, ordonnance de Louis XIV. pour les armées navales, 1689, liv. iii. tit. i.; ordonnance de 1766; lettre circulaire du ministre de la Marine aux préfets maritimes sur le salut du canon, du 9 frimaire, an X, Dufriche-Fontaine, t. ii. p. 1034; sur le Danemarck, ordonnance de 1748, dans le Merc. hist. et pol. 1748, p. ii. p. 171; sur les Provinces Unies des Pays-Bays, ordonnances de 1671, de 1750, Recueil de Van Placaaten, t. vi. p. 367.”

(a) De Jure Feziali, pt. 2, s. 8, 14, p. 132, (ed. Oxon. 1650.) “*Utrum quod nautæ, Principis alterius navi bellica vela non submittent, navis pro prædâ capi possit?*”

(b) Klüber s. 122.

Martens, s. 159.

(c) De M. et De C. Index Explicatif, Salut de Mer.

(d) De M. et De C. t. iv. p. 322.

the British ship or vessel, shall salute such foreign flag-officer or commodore with the number of guns to which a British officer of corresponding rank is entitled, upon being assured of receiving in return gun for gun: and in the event of the British ship meeting with such foreign flag-officer or commodore in a foreign port, similar complimentary salutes with such foreign flag-ship should be observed, if the regulations of the place shall admit thereof.”(e)

XXXVII. The regulations with respect to salutes from British ships to British men-of-war, are not strictly of an International character; but these regulations, and those relating to Colours, may perhaps be usefully mentioned in this place.(f) By the laws of the sea, the ancient constitution of the Admiralty, and the usage of the realm, it is an offence against the King’s prerogative to usurp or wear on board any private ship the flags, ensigns, jacks, or pendants worn by the ships of the Royal Navy.(g)

In consequence of the Union with Ireland, which commenced on the 1st of January, 1801, King George III. issued a proclamation of that date, appointing a certain ensign, drawn in the margin, to be carried by all merchantmen of the United Kingdom, and prohibiting the use of any other ensign in such ships; and also prohibiting them from wearing the Union Jack, or any pendants or colours usually worn by the King’s ships, without a special warrant from the Crown or the Admiralty. Under this proclamation, the hoisting or wearing of such colours is a contempt of the Crown, and punishable as such by the Court of Admiralty.(h)

In 1833, William Benson, master of the merchant steamship *Lord of the Isles*, was found guilty of contempt in wearing illegal colours; he having in or near the river Douro hoisted at the main peak a red pendant, which Captain Belcher of His Majesty’s ship *Ætna*, came on board and seized. For this offence of wearing colours used by His Majesty’s ships, the penalty of 50*l.* was inflicted, the Court having no power to mitigate the fine.(i)

[*44] *A penalty not exceeding 500*l.* is now annexed to this offence by the statute 17 & 18 Vict. c. 104, s. 105.

(e) Extract from Regulations relating to Salutes.

(f) The following remarks are extracted from *The Law relating to Officers of the Navy* (by Prendergast), Part II. p. 449.

(g) *Life of Sir Leoline Jenkins*, i. 97.

(h) *The Minerva*, 3 Robinson’s Adm. Rep. p. 34.

(i) *The King*, in his Office of Admiralty v. Miller, 1 Haggard’s Adm. Rep. p. 197. *The King v. Benson*, 3 ib. 96.

The last case was *The Queen*, in her Office of Admiralty v. James N. Forbes, master of merchant vessel *Lightning*, for wearing illegal colours (7th March, 1855). It usually happens that the offending party, on being served with the warrant of arrest, memorialises the Board of Admiralty, expressing contrition for the offence, and that on payment of the costs incurred, the fine is remitted. Ireland, as to all matters of Instance jurisdiction, is governed by its own Court of Admiralty; but neither Ireland nor Scotland have any Admiralty Prize jurisdiction. As to former provisions on this subject, see—

3 Geo. IV. c. 110, s. 2, (smuggling, 500*l.*)

6 Ib. c. 108, s. 15, (smuggling, 50*l.*)

3 & 4 Will. IV. c. 50, c. 53, s. 9, (smuggling, 50*l.*)

4 Ib. c. 13, s. 11, (smuggling, not above 500*l.*)

8 & 9 Vict. c. 87, s. 10.

It is also a contempt of the Crown, if a British merchant-vessel pass a ship of the Royal Navy without striking topsail: and the Court of Admiralty, on complaint of the offence, will arrest the master of the merchantman to answer for the contempt. An instance of this nature occurred on the 4th of November, 1829, when the Court of Admiralty issued a warrant of arrest against the master of the schooner *Native* for contempt in passing His Majesty's ship *Semiramis*, in Cork harbour, without striking or lowering her royal, being the uppermost sail she was then carrying."(*j*)

XXXVIII. 3. Maritime ceremonials in *particular seas*, as distinguished from the *open sea*, and from the sea within cannon-shot distance from the shore, remain to be considered; such were, in former days, the claims of maritime honours of Venice in the Adriatic, of Genoa in the Ligurian, of France in another portion of the Mediterranean, and such are, at this day, the claims of Denmark with respect to ships entering the Baltic, and of Great Britain with respect to ships in the *narrow seas*, which surround her coast.

Bynkershoek,(*k*) it has been already observed, denies their claims. He does not object to their being conceded as matters of *Comity* (*comiter observari*); but he denies that they can be demanded of right (*juris*).

The claims of Denmark have been the subject of various treaties, the last of which was made on the 15th of January, 1829, with Russia. The last article of this Treaty refers to a protocol signed at Aix-la-Chapelle on the 21st November, 1818, which recommended a general convention upon the subject of maritime ceremonials between all the maritime *powers. This has never been executed; but the Treaty [**45*] between Denmark and Russia provides that the salute of vessels of war, "*dénué d'utilité réelle est généralement tombé en désuétude parmi les nations européennes,*" shall undergo such modifications as to take away most of the previously existing formalities between these two powers on this subject.

The Treaties between Great Britain and Holland upon the subject of the particular claims of the former to maritime honours in the narrow seas, are those of 1662, 1674,(*l*) 1784.(*m*)

XXXIX. In the above enumeration are omitted that class of injuries which relate to the refusal of that Precedence, which custom has established among the representatives of nations; the consideration of this class of injuries seems to belong more properly to the Chapter on Ambassadors;(*n*) as it rarely happens, that the Governors of a State meet together in person, as well as by representatives. Such Congresses,

(*j*) The King v. Benson, 3 Haggard's Adm. Rep. 97, note.

(*k*) Quæst. Jur. Publ. l. ii. ch. xxi.

(*l*) See Sir L. Jenkins's Letters, vol. ii pp. 699, 700, 702, 708, &c., (some before, some after A. D. 1674,) relating to striking the flag.

Vide ante, vol. i. pp. 196-7.

(*m*) By the second article of the Treaty of 1784, it is provided, "*A l'égard des hommes du pavillon et du salut en mer par les vaisseaux de la République vis-à-vis de ceux de S. M. Britannique, il en sera usé respectivement de la même manière qui a été pratiquée avant le commencement de la guerre qui vient de finir.*"

De M. et De C. i. 323.

(*n*) Vide post.

however, have taken place. Not to go further back than 1814, there have been no less than five Congresses since that time, at which European Potentates have met together in person.

1. The Congress of Vienna, closed in the month of June, 1815.
2. The Congress of Aix-la-Chapelle, in 1818.
3. The Congress of Troppau, in 1820.
4. The Congress of Laibach, in 1821.

The motives assigned for these two last were the alleged revolutionary movements in Naples and Piedmont, rendering [*46] the state of Europe insecure. Upon a similar allegation with respect to the disturbed state of Spain, a fifth Congress was held at Verona, in 1820.

XL. It is of course competent to States to renounce, either tacitly by *usage* which they have long acquiesced in and recognized, or openly by *treaty*, any portion of the Rights incident to their primitive equality.

As in all conferences some persons must precede others, a sense of necessity and a regard for order, and perhaps also a voluntary homage to the real position and consequence of different States, have introduced, into Europe at least, a certain rule and custom, which it is the duty and interest of all States to adhere to. (o) At the period when the system of ceremonial honours and distinctions began to grow up in Europe, the most powerful States were governed by an emperor, (p) or by a king upon whose head the crown had been placed, with all the solemnity and sanctity which religious rites could impart. These circumstances conspired with the vast actual superiority of their wealth, influence, power, to procure for emperors and kings those privileges and prerogatives over other States which are universally designated as Royal Honours (*Honores Regii, Honneurs Royaux, Königliche Ehren*).

[*47] *Vattel, though strongly indisposed (q) to allow the existence of any prerogative as incident to a monarchical form of govern-

(o) Martens, l. iv. ch. ii. s. 25.

(p) The idea of the paramount superiority of the Emperors of Germany long prevailed in Europe, and is actually combated by our great English civilian, Arthur Duck, who wrote in the seventeenth century. It was derived from the notion of their being successors, through Charlemagne, of the Roman, as distinguished from the Greek, Emperor. At the time of Charlemagne, Vattel remarks, there was "une idée récente de la majesté du véritable empire Romain."—L. ii. ch. iii. s. 40. He cites from Bodinus, *De Republicâ*, l. i. ch. ix. p. m. 139. The observation of Bartolus was, that they were heretics who denied that the Emperor was the sovereign paramount of the world. Bartolus died in 1356. The notion of the real importance attached to the title of Emperor caused many States, in the middle ages, to be careful in designating their realms as an "Empire," and their crown as "Imperial." Great Britain has long spoken of her "Imperial Crown" in all her public acts.

Blackstone's Commentaries, vol. i. p. 242.

Martens, s. 127, note 6.

(q) L. ii. ch. iii. s. 38.—"La forme du gouvernement est naturellement étrangère à cette question. La dignité, la majesté, réside originairement dans le corps de l'Etat; celle du souverain lui vient de ce qu'il représente sa Nation. L'Etat aurait-il plus ou moins de dignité, selon qu'il sera gouverné par un seul ou par plusieurs? Aujourd'hui les rois s'attribuent une supériorité de rang sur les républiques; mais cette prétention n'a d'autre appui que la supériorité de leurs forces. Autrefois la république Romaine regardait tous les rois comme bien loin au-dessous d'elle. Les monarques de l'Europe ne trouvant en leur chemin que de faibles républiques, ont dédaigné de les admettre à l'égalité. La république de Venise et celle des

ment, nevertheless observes: "Si les traités, ou un usage constant, fondé sur un consentement tacite, ont marqué les rangs, il faut s'y conformer. Disputer à un prince le rang qui lui est acquis de cette manière, c'est lui faire injure, puisque c'est lui donner une marque de mépris, ou violer des engagements qui lui assurent un droit."^(r)

And in another place (under the head of "Des égards mutuels que les souverains se doivent") he says: "Le plus grand monarque doit respecter dans tout souverain le caractère éminent dont il est revêtu. L'indépendance, l'égalité des Nations, les devoirs réciproques de l'humanité, tout l'invite à marquer au conducteur même d'un petit peuple, les égards qui sont dus à la qualité. Le plus faible Etat est composé d'hommes, aussi bien que le plus puissant, et nos devoirs sont les mêmes envers tous ceux qui ne dépendent point de nous.

"Mais ce précepte de la loi naturelle ne s'étend point audelà de ce qui est essentiel aux égards que les Nations indépendantes se doivent les unes aux autres; en un mot, de ce qui marque que l'on reconnaît un Etat, ou son souverain, pour être véritablement indépendant et souverain, digne par conséquent de tout ce qui est dû à cette qualité. *Du reste, un grand monarque étant, comme nous l'avons déjà fait [^{*48}] observer, un personnage très-important dans la société humaine, il est naturel qu'on lui rende, en tout ce qui n'est que pur cérémonial, sans blesser en aucune manière l'égalité des droits des Nations, qu'on lui rende, dis-je, des honneurs auxquels un petit prince ne saurait prétendre, et celui-ci ne peut refuser au monarque toutes les déférences qui n'intéressent point son indépendance et sa souveraineté."^(s)

XLI. A State, once possessed of certain International privileges, retains them, whatever change her internal constitution may have undergone: Cromwell would not allow the slightest mark of honour which had been paid to the representatives of the Monarchy to be omitted towards those of the Republic of England.

In the Treaties between the French Republic^(t) and the other European Powers, it was expressly stipulated that the same ceremonials as to rank and etiquette which had been observed before the Revolution should be continued between them; and the same rule was observed towards the recent Republic of France.

The Republics of Venice and the United Netherlands were always admitted to Royal Honours; though their Ambassadors yielded precedence to those of Crowned Heads.

The Republic of Genoa and the Order of Malta were never indisputably possessed of this privilege, though the former claimed equality with Venice, and precedence over Switzerland.

In later times, Switzerland collectively, not in its individual cantons, the United States of North America, the German Confederation (*Deutsche*

Provinces-Unies ont obtenu les honneurs des têtes couronnées; mais leurs ambassadeurs cèdent le pas à ceux des rois."

(r) Vattel, l. ii. ch. iii. s. 40; vide also s. 46.

(s) Vattel, l. ii. ch. iii. s. 47.

(t) Treaty A. D. 1797. Campo Formio, art. 23.—Martens.

[*49] *Bund*(u); and it is presumed, *the Empire of Brazil, have been considered entitled to this privilege.

The Sovereign States of Europe are,(x) with respect to this matter of etiquette, classified into—

1. Those who are entitled to Royal Honours.
2. Those who are not.

1. It seems to be now an established principle of International etiquette, that the Crowned Heads of Europe are entitled to an equal rank, one having no precedence (*Proedria*, *Protostasia*, *Précédence*, *Préséance*) over the other.

XLII. At different periods of history, France, Spain, and Russia have laid claim to precedence over other States; but the claim appears never to have been allowed. At the Peace of Passarowitz(y) (1718,) and in subsequent Treaties, that of Belgrade for example in 1738, Austria has covenanted with the Ottoman Porte for a perfect equality of rank. “*Hæ nugæ seria ducunt in mala.*” But as various modes have been adopted to avoid the evils growing out of squabbles for precedence, sometimes it has been resolved that at Congresses and meetings each place shall be considered as the first; at other times, ambassadors have signed their names in the order of the alphabet. But the easiest expedient seems to be the use of the *alternat*, or *alternative*. By the *alternat*,(z) the rank and place of different States from time to time undergoes a change, which is determined by a regular order or by lot,—the same State occupying different places in the same ceremonial.

XLIII. In the signing of Treaties, the usage of the *alternat* is generally adopted, it being contrived that each State *shall write its signature in the first place in the copy of the treaty destined for it. This usage was adopted by the Quadruple Alliance at London in 1718, and at the Peace of Aix-la-Chapelle in 1748.

At the same time, even this sensible arrangement has occasionally been demurred to, protested against, or altogether rejected.(a)

Sometimes, as at Utrecht in 1713 and Aix-la-Chapelle in 1748, each of the contracting parties has delivered to the other a copy of the Treaty signed by itself only.(b)

Roman Catholic Sovereigns(c) have yielded precedence to the Pope as an acknowledgment of his character as Vicar of Christ and Sovereign Pontiff of the Roman Catholic Church; with a reservation of their own Right of Sovereignty.

(u) Martens, l. iv. c. ii. s. 133.—“Il ne serait pas extraordinaire que la Confédération Germanique, reconnue pour être puissance européenne, ne se crût pas tenue de céder, dans des occasions, le pas à une des têtes couronnées, ou même ne se crût autorisée à prétendre le pas sur ceux de ses membres qui ne portent point de couronne dans une autre qualité; cependant jusqu'à présent il n'y a pas encore eu d'occasion de contester sur ce point.”

(x) Klüber, ss. 91–2. (y) Günther, Band i. pp. 220, 233, 244. Bynkershoek, Quæst. Jur. Pub. l. ii. ch. ix.

Spain's dispute as to the “pas” with France was settled by the 27th article of the Bourbon Family Compact.

(z) Klüber, s. 104.

(a) Schmauss, i. 1743.

Günther, b. i. pp. 229, 234, 238, 247, 274. Portugal in 1763; Treaty of Sardinia in 1748; Treaty of Aix-la-Chapelle; France; Hungary; Bohemia.

(b) Günther, i. 275.

(c) Ib. 221.

The kingdoms whose Churches are subject to the Patriarch of the East, as Russia and Greece; and Great Britain, whose Catholic Church has no longer any relations with the Bishop of Rome as Patriarch of the West, accord no precedence on such ground. Nor does Prussia, nor the minor Protestant Powers of Germany, nor the Ottoman Empire, ever concede such precedence. But, as Sovereign of the Roman States, the Pope is entitled to the Royal Honours mentioned above.(d)

Neither the European States, nor States generally, have ever bound themselves by agreement or pact to any fixed or certain rule with respect to this question of precedence; though attempts have been made to enact a binding regulation upon the subject.

*The great ecclesiastical councils, at which sovereigns were often present in person or by representative, furnished a ground [*51] for the interference of the Pope in this matter.(e)

In 1504, Julius II. promulgated a table of precedence for the European States, founded upon a variety of reasons now generally acknowledged to be trifling and insufficient. This regulation,(f) it is said, was never followed, not even in the Councils or in the Pope's chapel, and, it need scarcely be said, is wholly without weight or influence upon modern International Law. The next attempt(g) was made by the eight European Powers who signed the Treaty of Paris in 1814. They nominated a commission for the purpose of considering and reporting "des principes à établir pour régler le rang entre les couronnes, et de tout ce qui en est une conséquence." The commission did suggest a uniform rule,(h) whereby all public ministers should be divided into three classes of—

1. *Ambassadors or Nuncios.*
2. *Envoyés.*
3. *Chargés d'Affaires.*

But great differences and doubts arose respecting this classification at the time, principally with respect to the rank which should be assigned to the Great Republics. And at the Congress of Aix-la-Chapelle, 21st November, 1818, at which Austria, Russia, France, Spain, and Great Britain were represented, a certain rule of precedence was agreed to by a protocol.(i)

*Though the regulation of etiquette was thus confined to the representatives of the five crowned heads, it appears to have been [*52] generally adopted as a rule of positive International Law.(k) Regulations, adjusting the ceremonials for the reception of foreign ministers, were instituted by the United States of North America on the commencement of their career as an independent State in 1783.(l) These will be mentioned hereafter when the subject of embassies is considered.

(d) Günther, ib. s. 94.

(e) Günther, t. i. p. 219.

(f) Klüber, s. 94. Martens, s. 131.

(g) Klüber, s. 94, n. c.

Martens, s. 131, n. 6.

(h) De M. et De C. t. iii. p. 190, l.

(i) Acte final du Congrès de Vienne, art. 118, et son Annexe.

Klüber's Acten des Wiener Congress, Band viii. 3–98, 102, n. 108, f.; Band vi. s. 93, n. 204, f.

Martens, Man. Dipl. c. iv. s. 38.

(k) Wheaton's Elem. vol. i. p. 262.

(l) De M. et De C. t. i. p. 264.

XLIII. (a) The Right we are treating of, flowing as it does from the essential equality of nations, extends to the subject of the language to be employed in International communications.(m) No nation has a right to insist that a particular language, whether it be its own or that of another country, shall be exclusively employed in all communications with it.

Until the middle of the eighteenth century the Latin language—the medium through which Christianity and Civilization have been conveyed to the West—continued to be employed as the channel of formal diplomatic intercourse.(n) In this universal tongue, which has many recommendations as the bond of a common civilization, are written, among others, the Treaties of Niméguen; of Ryswick; of Utrecht, 1713; of Baden, 1714; of the Quadruple Alliance of 1718; of Vienna, 1725 and 1738.(o)

The Pope continues to use the Latin language in his International acts.

The aggrandisement of the Spanish monarchy towards the end of the fifteenth century appears to have introduced *for a short time the [*53] use of the Castilian tongue as a pretty general instrument of International intercourse. Since the reign of Louis XIV. the French language has been generally used as the diplomatic language of Europe, but under a protest preserving the dignity of other nations.(p) So late as the year 1790, the Emperor of Austria, Leopold II., in his correspondence with Louis XVI. respecting the invasion of the right of the German princes in Alsatia, and the infringement thereby of the Treaty of Westphalia, complained that the correspondence of the French king was in the French language, contrary to the former usage, which required communications between Austria and France to be made in the Latin language; the letter of the Emperor was written in that language.(q)

By the 120th article of the final act of the Congress of Vienna of 1815(r) it is stipulated—"La langue Française ayant été exclusivement employée dans toutes les copies du présent Traité, il est reconnu par les Puissances qui ont concouru à cet acte, que l'emploi de cette langue ne tirera point à conséquence pour l'avenir; de sorte que chaque Puissance se réserve d'adopter dans les négociations et conventions futures la langue

(m) Klüber, ss. 113–114.

Wheaton's Elem. pp. 197–198.

"Language, the leading principle which unites or separates the tribes of mankind."—Gibbon, vol. viii. c. xlvii. p. 338.

(n) Duck, de autoritate et usu Juris Civilis, p. 150, &c.

J. L. E. Putman, De usu linguæ latinæ in vitâ civili causisque maximè publicis, cited by Klüber, n. s. 114. See note below, as to Quadruple Alliance.

(o) Schmauss, Corp. Jur. Gent. p. 1555, ccliv.

(p) Schmauss, 1734.

Peace of Radstadt (A. D. 1714,) art. 33.

" of Aix-la-Chapelle (1748,) sep. art. 2.

Wenck, C. Jur. Gent. ii. 360.

Alliance between France and Austria, sep. art. 2.

Treaty between Poland and Prussia, 1773, art. 14.

(q) Koch, ch. xxvi.

Wheaton's Hist. p. 347, note.

(r) Martens, Recueil, &c., t. x. p. 430.

dont elle s'est servie jusqu'ici dans ses relations diplomatiques, sans que le Traité actuel puisse être cité comme exemple contraire aux usages établis."

In later times, however, and more especially since Mr. Canning's brilliant administration of the foreign affairs of Great Britain, States have used their national language in *their instruments of diplomatic intercourse, accompanying them, if necessary, with a translation [*54] in the language of the State with which they are in correspondence.

It appears to have been a maxim of the Ottoman Porte to regard no treaty as of perfect obligation, unless couched in its own language. The European States have avoided what might be thought a derogatory concession to this whim, by taking care that the Treaties with this Power should be written in divers languages.

*CHAPTER VI.

[*55]

TREATIES.(a)

XLV. THE International obligations arising out of Natural or Customary Law may receive additions or restraints from specific Conventions or Treaties.(b)

It has been already observed, that the consent of Nations is in some degree evidenced by the contents of Treaties, and that they constitute an important part of International Law.(c)

Treaties (*traités, Völkerverträge, Tractate*) are the written *portion of that Law which binds together the Society of States, [*56] and occupy a place in that system, which, in some degree, corresponds

(a) Grotius, l. ii. c. xi. de promissis; c. xii. de contractibus; c. xiii. de jurejurando; c. xiv. de eorum qui summum imperium habent promissis et contractibus et juramentis; c. xv. de fœderibus et sponsionibus; c. xvi. de interpretatione.

Vattel, l. ii. ch. xii.—xvii.

Martens, l. ii. c. ii. 46.

Klüber, s. 141, u. s. w.

Wheaton, Elem. vol. i. p. 38, &c.

Heffters, ss. 144, 175.

Fénélon, tom. xxii. pp. 293—4. (ed. 1824.)

(b) "At nobis accuratius instituenda partitio est, ut primum dicamus *fœdera alia idem constituere, quod juris est naturalis, alia aliquid ei adjicere.*"—Grôt. l. ii. c. xv. s. 5.

"I can scarcely think that Ministers mean to contend that cession by Treaty does not give a right to possession. Where are we to look, therefore, to ascertain the right of a country to any place or territory, but to the last Treaty? To what would the opposite doctrine lead? France might claim Canada, ceded in 1763, or we Tobago, ceded in 1783. It might be urged that they took advantage of our dispute with our own Colonies, and that the Treaty gave no right. Canada, Jamaica, everything might be questioned. *Where would be the power of Europe if these doctrines were to be acted on? Every country must continue in a state of endless perplexity, armament, and preparation. But, happily for mankind, a different principle prevails in the Law of Nations. There the last Treaty gives the right.*"—CHARLES JAMES FOX, Speech on the Russian Armament, 1792.

(c) Vide ante, vol. i. p. 44.

to the place occupied by statutes, in the system of the Municipal and Public Law of independent States.(d)

Moreover, the Right to enter into lawful Conventions or Treaties with other States is as unquestionably inherent in every independent State, as the right to make lawful covenants is inherent in every individual.

The contract of the individual, therefore, and the statute of the independent State, both furnish analogies for the elucidation of this branch of our subject. It would be foreign to the object of this work to dwell upon the necessity of the study of International Treaties to the Historian, the Statesman, and the Philosopher; but it is proper to observe in this place, first, that existing Treaties contain the present Positive Law of Nations between the contracting parties; secondly, that abrogated Treaties often furnish a necessary means of construing those which are in force; while—if due and judicial regard be had to the occasion which produced them, the subject-matter of their stipulations, the object for which, and the epoch during which they were contracted, and the number and character of the nations which were parties to them—they are also of value as repositories of certain maxims of International Law, as records of the consent of nations to certain principles as regulating International Intercourse, and of the instrumental forms by which International consent is expressed and ratified.(e) Upon a scrupulous fidelity in the observation of Treaties, not merely in their letter but in their spirit, obviously depends, under God, the peace of the world. *Pacta sunt servanda* is the pervading maxim of International, as it was of Roman jurisprudence.(f)

[*57] The treaty-breaking State is the great enemy of Nations, *the disturber of their peace, the destroyer of their happiness, the obstacle to their progress, the cause—to sum up all charges—of the terrible but necessary evil of War.(g)

“Fundamentum justitiæ est fides, *i. e.* dictorum conventorumque constantia et veritas.”(h) To this remark of Cicero may be added the maxim which Ulpian puts in the form of a question: “Quid tam congruum fidei humanæ quam quæ inter eos placuerunt servare?”

Many a Christian State might be edified by the preamble to the Treaty between Nadir Shah the Emperor of Persia, and the Sultan Mahmoud, Emperor of the Turks, in 1747. “Glory be to God” (it begins,) “who among other things has rooted out all hatred and enmity from the bosoms of these nations, and has commanded them *to keep their Treaties inviolable*, as the ever-glorious Book saith: *O ye who believe, keep your covenants.*”(i)

XLV. Different writers have adopted different arrangements of this

(d) Warnkönig, Rechtsphilosophie, s. 218.

(e) Vide ante, vol. i. pp. 44, 50, 64.

(f) Dig. ii. 14, 1 pr.

(g) Vattel, l. ii. c. xv. passim, s. 220. “La foi des traités, cette volonté ferme et sincère, cette constance invariable à remplir ces engagements, dont on fait la déclaration dans un traité, est donc *sainte et sacrée* entre les nations, dont elle assure le salut et le repos: et si les peuples ne veulent pas se manquer à eux-mêmes, l’infamie doit être le partage de quiconque viole sa foi.”

Klüber, s. 145.

(h) Cic. De Offic.

(i) Wenck, pp. 305–6.

part of International Jurisprudence, and it would be difficult to pronounce upon the decided superiority of any. Perhaps the following preliminary considerations may contribute to a clear conception of the subject.

Treaties may be considered—

First, as to their *subject*, e. g. whether they relate to a matter of Natural Right, which, like a declaratory enactment, only adds another sanction to existing Law; or whether they contain some obligation as to what was previously optional or indifferent, as the abandonment of a right, the concession of a privilege, or the imposition of a *servitus*.(k)

*Secondly, with respect to their *object*, whether it be of a permanent or transitory character, whether it relate exclusively [*58] to the contracting parties, or have for its object to *guarantee* the safety of possessions of a Third Power. Treaties of guarantee deserve a special consideration.(l)

Thirdly, with respect to the *contracting parties*, e. g. whether they be both Christian, or whether they be Christian on the one side and Heathen or Infidel on the other, or whether they be Christian on the one side and on the other Mahometan, and whether within or without Europe.(m)

Fourthly, with respect to the *period of time* in which they were contracted.

1. Whether they were contracted before or after the Treaty of Westphalia, 1648.(n) The first fundamental pact of Europe which struck at the root of the foreign temporal authority of the Pope,—the last relics of which disappeared from the code of International Law when this great statute was engrafted on it,—introduced, within certain limitations, the principle of intervention on the ground of religion. This Treaty recognized as its foundation that the Balance of Power was necessary for the safety of nations, and though the equilibrium effected by it related chiefly, if not exclusively, to the German nations of Europe, it gave stability to many principles of International Law, and a consistent form to that great ingredient of the liberties of Europe, the confederation of the German States; and lastly, this Treaty formed the basis of many succeeding Conventions, which, without a reference to it, would be unintelligible.(o)

*2. Whether before or after the Treaty of Utrecht (1713), [*59] which again affirmed the principle of the Balance of Power as a necessary safeguard for the liberties of nations, and which laid down as an inevitable consequence the two propositions, that the Crown of Spain should not be worn by the sovereign of another European territory, and that the Low Countries should not be added to the compact and magnificent domain of France.

(k) Vide ante, vol. i. p. 302–6.

(l) Vide post.

(m) Vide Hertzslet's Commercial Treaties for a variety of Treaties between Christian Powers and African Princes.

(n) Koch, Hist. des Tr. Introd., p. 30.

(o) "Denique per hanc pacem (Westphalicam) suscitatum est *Jus illud Gentium*, quod recentiori ætate enatum, hodieque etiam bello ac pace magnâ auctoritate floret, rectè agentibus aliorum amicitiam ac societatem conciliat, legum violatoribus communem gentium indignationem ac bella parit."—Klinkhamer, De bello propter successionem Regni Hispanici gesto Pace Rheno-Trajectinâ composito, 1829: Amstelodami.

3. Whether before or after the period intervening between the Treaty of Utrecht (1713) and the breaking out of the French Revolution (1791,) during which Prussia and Russia had entered as new elements into the European system, and a new power in another hemisphere, the United States of North America, had taken its place in the community of States, and not a little affected their International relations for all time to come.

4. Whether it be during the twenty-five years' war of the French Revolution, and before the last great adjustment of the European system, the Treaty of Vienna (1815.)

5. Whether it be between that period and the present time,—that long period of International peace, now, unhappily, interrupted by a war, the end and the consequences of which no political sagacity can clearly foresee. During this latter period, many Republics in Central and Southern America, as well as Belgium and Greece in Europe, have become members of the great community of States; during this period European Turkey has been recognized as being, and has claimed to be entitled to the rights and bound by the obligations incident to members not only of the general, but of the European community of nations; (*p*) during this period the barrier which shut out China from the commerce of the western hemisphere has been broken down. (*q*)

XLVI. There are, moreover, certain International engagements which [**60*] are not, strictly speaking, Treaties,—which *cannot be considered as *pacta publica*. (*r*) Such are contracts between the State and private individuals of another country, contracts relating to the private affairs of the Sovereign; even, generally speaking, marriages of the royal family belong to the *jus privatum*, (*s*) and do not rise to the dignity of *fœdera*. (*t*)

XLVII. Treaties are also to be considered with reference to their *occasion* and *object*. They may, it is obvious, contemplate a perpetual duration and a permanent object, or be contracted for a definite period and a transitory purpose (*accords, conventions, factions*); they may have reference to the contracting parties only, or they may concern a third party, on whose behalf or with respect to whom, other parties are to enter into obligations. This class of cases belongs to the difficult category of guaranteeship which must receive hereafter a closer examination and fuller discussion.

XLVIII. The first point to be considered is, who are competent to

(*p*) Vide ante, vol. i. p. 84, and Appendix, p. 500.

(*q*) Vide ante, vol. i. pp. 212—363.

(*r*) "Conventionum autem tres sunt species; aut enim ex publicâ causâ siunt, aut ex privatâ, privatâ aut legitimâ, aut juris gentium. Publica conventio est, quæ fit per pacem, quoties inter se duces belli quædam paciscuntur."—Dig. ii. t. xiv. 5.

(*s*) Grotius, ii. c. 15, s. 1. "Publicas ergo conventiones eos intelligit, quæ nisi jure imperii majoris aut minoris fieri nequeunt, quâ notâ differunt non tantum a contractibus privatorum, sed et a contractibus regum circa negotia privata."

(*t*) Vattel, l. ii. c. xii. s. 152. "Un traité, en latin *fœdus*, est un pacte fait en vue du bien public par des puissances supérieures, soit à perpétuité, soit pour un temps considérable."

Klüber, s. 141.

contract a Treaty? This competence is possessed by all independent kingdoms.

A protected State may, if it has retained its sovereignty, make Treaties and Alliances, unless the power has been expressly renounced, or cannot be exercised consistently with the conditions of its protection.^(u) We have seen that States under a Federal Union may or may not, according to the *terms of their confederation, be competent [*61] to enter into Treaties with foreign nations.^(x)

The question as to the proper organ for transacting negotiations and concluding Treaties between States, will be considered at length in a subsequent Chapter upon Embassies. It is sufficient to mention in this place, that the valid execution of Treaties requires the agency of a representative of a State,—they must be contracted either immediately with the Sovereign Power of another State, or with a Plenipotentiary duly commissioned, according as the constitutional forms of the State may prescribe.^(y)

It was once a matter of serious doubt and discussion whether one nation could enter into Treaties with another which professed a different religion. Not only the earlier writers upon International Law, but Grotius himself debates this question at considerable length; and even the further question, whether a League and a War of Christian nations against the Infidels be not a matter of Christian duty.^(z) There was a period when the state of religious feeling and party,^(a) and still more when the actual and continued enmity between the Christian and the Mahometan, rendered this discussion neither unnecessary nor unprofitable.^(b) The conclusion of Grotius is in favour of the lawfulness of such Treaties.^(c)

*No subordinate corporations in a State can be contracting parties to a Treaty with a Foreign State.^(d) A Sovereign may in [*62] his private capacity enter into contracts with Foreign Powers; but these are not Treaties properly so called.

XLIX. Secondly, the free reciprocal consent of both contracting parties, which is indispensable to the validity of a contract between individuals, is equally requisite for a Treaty between States.^(e) Mere negotia-

(u) Vide ante, vol. i. pp. 91—94.

Vattel, l. ii. c. xii. s. 155.

Klüber, s. 141.

(x) Vide ante, vol. i. pp. 120—1.

(y) Vattel, l. ii. c. xii. s. 156. Klüber, s. 142.

(z) L. ii. c. xv. 8, 9, 10, 11, 12; c. xx. 48.

(a) A great attempt has been made in Russia and Greece, to rekindle this spirit during the existing war between Russia and Turkey.

(b) The *Le Louis*, 2 Dodson's Ad. Rep. p. 244.

(c) "De fœderibus frequens est quæstio, licitène ineantur cum his qui à verâ religione alieni sunt: quæ res in *jure natura* dubitationem non habet. Nam id jus ita omnibus hominibus commune est, ut Religionis discrimen non admittat."—L. ii. c. xv. 8.

Vide ante, vol. i. pp. 15, 64.

"La loi naturelle seule régit les traités des nations; la différence de Religion y est absolument étrangère."—Vattel, l. ii. c. xii. s. 162.

Vide ante, vol. i. pp. 81, 82, 22.

(d) Vide ante, vol. i. pp. 145—6.

(e) Vattel, l. ii. c. xii. ss. 157—8—9. Klüber, s. 143.

tions, preparatory communications, are in their nature not of a binding character. Consent must not have been given in error or produced by deceit, either by misrepresentation (*suggestio falsi*) or by concealment of important facts (*suppressio veri*.)

The analogy, however, between the Private Contract and the Public Treaty must not be pushed beyond what the reason of the thing may warrant. For instance, all contracts which have been the result of force or menace may be set aside; but the same observation cannot, without great limitations, be applied to Treaties. All Treaties which terminate a war frequently are, or may be, in a great measure, the effect of the force exerted by the victor over the vanquished—or may be the result of a menace of the more powerful to the weaker State. But Treaties concluded in consequence of these circumstances cannot be held null and invalid.^(f) If there be any analogy in this respect to the Private Contract, it is rather to that maxim of equity, which considers a contract entered into to avoid or to stop litigation binding upon the party who entered into it, though induced to do so by apprehension of the delay, expense, and uncertain event of a law suit. War, it must be remembered, is the terrible litigation of nations.^(g) Moreover, all civilized countries admit into their systems of private jurisprudence the axiom “*expedit reipublicæ ut sit finis litium* :”^(h) the axiom is equally applicable [*63] to the *great Republic of Nations; and it is manifest that, if the obligations of Treaties could be avoided upon the plea, that one of the contracting parties had consented through motives of fear, or under the influence of superior force, the faith of Treaties—the great moral tie which binds together the extremities of the globe—would be rent asunder. This observation of course does not apply to a case, which now rarely happens, of personal fear or actual violence operating upon the representative of the State who signed the Treaty. Both the rule and the exception, however, may be illustrated by events of recent history: The resignation of his crown and kingdom, extorted by Napoleon from Ferdinand VII. at Bayonne, whither he had decoyed that monarch and his family, was clearly—the duress and condition of the party abdicating being considered—invalid; but the resignation of Napoleon at Fontainebleau was not extorted by treachery or duress, but was the consequence of defeat in open legitimate war.⁽ⁱ⁾

Private contracts may be set aside on the ground of, what is technically called by English Law, the want of consideration, the inferences of fraud and unfair dealing arising from the manifest injustice and want of mutual advantage. But no inequality of advantage, no *lésion*, can invalidate a Treaty. It is truly said by Vattel, “*Si l’on pouvait revenir d’un Traité, parce qu’on s’y trouverait lésé, il n’y aurait rien de stable dans les contrats des nations*.”^(k)

The consent must be reciprocal; therefore the engagement of one party must be accepted by the other, though the particular epoch and the precise form, unless they happen to be matter of express covenant in the

(f) Grotius, l. ii. c. xvii. ss. 18-19.

(g) Schmalz, Europ. Völkerrecht, 54.

(i) Schmalz, pp. 53-4.

(h) Vide ante, vol. i. p. 274.

(k) L. ii. c. xii. s. 158.

Treaty itself, are unimportant. The acceptance of one party may precede or follow the engagement of the other, though in the interval it is competent to the former to retract its consent.

L. The consent may be signified in various ways.^(l) *Some [*64] jurists have asserted that the declaration of consent must be specified in writing ;^(m) but, though this be the usual and most convenient mode, it cannot be said to be indispensable to the validity of the Treaty.

But the declaration, whether written or oral, must be positive and clear. Mere suppositions and conjectures raise, at the utmost, a probability, but can institute no certain fact between nations. The *consensus fictus* of Civil Law is unknown to International Jurisprudence.

But the consent may be expressed in an instrument either drawn up in common by the parties to it, or signed separately by them, by an edict, an order, an ordinance, or letters patent addressed, in virtue of the Convention, to the subjects of either State.⁽ⁿ⁾

LI. What may be the lawful subject of a Treaty, is best shown by the negative statement of what is excluded from this category.^(o)

First, it is obvious that a Treaty cannot contain engagements inconsistent with those already entered into with other States.^(p)

Secondly, a Treaty may not contain an engagement to do or allow that which is contrary to morality and justice :^(q) it contains a morally impossible condition, which Governments, the *representatives of [*65] the justice, the morality, and the religion of their people, are not entitled to contract for—it is beyond the sphere of their agency.^(r)

Thirdly, it may be invalid upon the ground of physical impossibility existing at the time, or supervening from later circumstances.^(s)

LII. Various means have been resorted to, at various times, by various nations, to secure the sanctity and inviolability of International covenants ; before we consider them, it should be observed, that though it is now usual to reserve the final settlement of a Treaty negotiating by ambassadors for the Ratification of the Governments whom they represent,^(t) yet that if the negotiator be a Plenipotentiary, such Ratification cannot

(l) Klüber, ss. 141—143.

(m) P. J. Neyron, *De vi fœderum* (Gött. 1798,) iv. s. 23.

Schmalz, *Europ. Völkerrecht*, s. 52. "Es scheint mir nicht mit Unrecht behauptet, das unter den *europäischen* Mächten nur schriftliche Verträge und schriftliche Genehmigungen als verbindend würden."

(n) See Treaty of Commerce between Austria and Russia, 1785.

De Martens, 620—632.

(o) Vattel, l. ii. c. xii. ss. 160, &c.

(p) Hoffman, *ubi supr.*

(q) "Par la même raison, par le défaut de pouvoir, un traité fait pour cause injuste ou déshonnête est absolument nul, personne ne pouvant s'engager à faire des choses contraires à la loi naturelle."—Vattel, *ib.* s. 161.

"Nie kann ein völkerrechtlicher Vertrag Staaten oder Souveräne als die Repräsentanten und Träger des Rechts und der Sittlichkeit, worin auch die religiösen Interessen eingeschlossen sind, verpflichten."

(r) Heffters, 94.

Vide ante, vol. i. pp. 26—7.

(s) *Ib.* p. 42.

(t) A Treaty is not usually laid before the British Parliament until it be ratified.—See Lord Clarendon's remarks in the House of Lords as to the Treaty between Austria and the Porte, July 24, 1853.

be held essential to the validity of the Treaty, ^(u) unless the necessity for it has been expressly reserved in the powers given to the ambassador, or unless, as usually happens, it be the subject of stipulation in the Treaty itself. ^(v)

LIII. Sometimes Treaties have received Confirmation (*confirmation*, *Bestätigung*) when, for some reason or other, doubts have arisen as to their validity or as to their duration. The clause so common in Treaties, [*66] “that the former Treaty *shall be considered as if it were part and parcel of the present Treaty, and as if it had been inserted ^(x) word for word,” does not, according to the opinion of Klüber, ^(y) necessarily imply that the whole of the former is incorporated in the present Treaty; that is to say, it does not necessarily, according to this author, bind the Guarantees of the new Treaty to the fulfilment of the provision of the old Treaty; though it does so bind the original contracting parties to the first as well as to the second Treaty. Thus, if this author’s opinion be correct, the Guaranteeship ^(z) of Russia did not extend to the Treaty of Westphalia, when, in 1799, she became a Guarantee for the Treaty of Teschen, which referred among others to the Treaty of Westphalia; though the reference bound other powers who had been contracting parties to both Treaties.

Sovereigns have sometimes, on their accession to the throne, formally announced their adhesion to existing Treaties, but by this act, they have in reality conferred no additional validity upon engagements which were binding upon them before, and which they were compellable to execute. ^(a)

Treaties receive sometimes a renewal ^(b) (*renovatio pactorum*, *renouvellement*, *Erneuerung*) or prorogation after the term for which they have been contracted has expired, and sometimes a complete *re-establishment* (*restitutio*, *rétablissement*, *Wiederherstellung*) when they have altogether ceased to be in force from the intervention of War—a cause which will be considered hereafter—or from some other cause. These cases, however, are rather cases of restoration than of confirmation.

LIV. Among the means which have been resorted to for securing the performance of Treaties are to be enumerated,

- [*67] *1. Oaths. ^(c)
 2. Hostages.

^(u) Klüber, s. 142.

^(v) “Sed et per hominem alterum obligamur, si constet de voluntate nostrâ quâ illum elegerimus, ut instrumentum nostrum ad hoc speciatim, aut sub generali notione,” &c.—Grot. l. ii. c. xi. 12.

“Les souverains traitent ensemble par le ministère de leurs procureurs ou mandataires, revêtus de pouvoirs suffisants, que l’on appelle communément plénipotentiaires. On peut appliquer ici toutes les règles du droit naturel sur les choses qui se font par commission, &c., tout ce qu’il promet dans les termes de sa commission, et suivant l’étendue de ses pouvoirs, lie son constituant. Aujourd’hui, pour éviter tout danger et toute difficulté, les princes se réservent de *ratifier* ce qui a été conclu en nom par leurs ministres,” &c.—Vattel, l. ii. c. xii. s. 156.

^(x) E. g. The Treaty of Teschen, 1779, so incorporated the Treaties of Westphalia, Breslau, Berlin, Dresden, Paris and Hubertsbourg.

^(y) Klüber, s. 153.

^(z) Vide post, “GUARANTEE.”

^(a) Vide ante, vol. i. p. 151.

^(b) E. g. Treaties of Subsidy. See Vattel, l. ii. c. xiii. s. 199.

^(c) “Apud omnes populos et ab omni ævo circa pollicitationes promissa et contractus maxima semper vis fuit jurisjurandi.”—Grot. l. ii. c. xiii. 1.

3: Pledges.

4. Guarantees.

α. Consisting of offering persons as sureties.

β. Choosing Third Powers as Guardians of the Treaty.

The confirmation by oath of the contracting parties was adopted in the Treaty of Madrid in 1526, between Francis I. and Charles V.; at the Peace of Cambria, 1529; (*d*) of Chateau Cambresis, 1559; (*e*) at the famous Peace of Munster between Spain and her revolted Dutch colonies in 1648; at the peace of the Pyrenees in 1659; (*f*) at the peace of Aix-la-Chapelle between France and Spain in 1668; at the peace of Ryswick in 1697. (*g*) The most modern example is the alliance formed between France and Switzerland in 1777, and solemnly confirmed by the oath of the contracting parties in the Cathedral of Solère.

The oath, now discontinued in practice, was not always a very binding confirmation, for there are various instances of Roman Catholic Princes being absolved by the Pope from the obligations of it. Ferdinand, called *par excellence* the Catholic, was so released by Pope Julius II.; (*h*) Francis I. by Leo X. and Clement VII.; Henry II. of France by the Papal Legate Caraffa. (*i*) This abuse gave rise to a clause not unusual in Treaties and other public documents, to the effect that the contracting party would not attempt to obtain a release from his oath [*68] either personally or through the agency of any other person, and that he would not accept such dispensation if offered to him. (*k*)

LV. (*l*) *Hostages (obsides, otages, Geissel)* were formerly required and given as pledges for the performance of the conditions of a Treaty. As late as the peace of Aix-la-Chapelle in 1748, Hostages were stipulated for. (*m*) It is a clear proposition of International Law that any proceeding of rigour against a Hostage, even if he be forcibly seized in time of war, beyond what may be necessary for the security of his person, is illegal.

If the giver of the Hostage fail in fulfilling his pledge, it is lawful for the receiver to retain the hostage; but wholly unlawful, as once the practice was, to put him to death. (*n*) If the hostage die, the giver is not, except in the case of an express stipulation, bound to replace him. The

(*d*) Article 46.

(*e*) Article 24.

(*f*) Article 124. Schmauss, 709.—“Solemniter tactâ cruce, sanctis Evangeliiis, cononibus Missæ, et per honorem suum jurabunt observaturum, se et impleturum plenè realiter, et bonâ fide omnia in articulis præsentis Tractatûs contenta.”

(*g*) Article 38.

(*h*) Rousset, Supplément, T. iii. P. i. p. 17.

(*i*) Vattel, l. ii. c. xv. s. 223.

(*k*) E. g. “Diploma cessionis monarchiæ Hispanicæ,” A. D. 1703, in Schmauss, 1163.—“Jureque jurando corporaliter præstito fidem nostram quam solemniter adstrinximus, nullo unquam tempore aut modo a nobis aut aliis infringendam omni quorumlibet qualiumque contradictione, exceptione generali ac speciali restitutione, dispensatione ac absolutione, etiam Pontificiâ, aliisque beneficiis Legis seu Consuetudinis aut nominis perpetuò exclusis.”

(*l*) Klüber, s. 156.

(*m*) “Sa Majesté Britannique s’engage aussi de son côté à faire passer auprès du Roy très-Chrétien, aussitôt après les ratifications du présent Traité, deux personnes de rang et de considération, qui y demeureront en otage jusques à ce qu’on y ait appris d’une façon certaine et autentique, la restitution de l’isle Royale,” &c.—Wenck, ii. 352-3.

(*n*) Vattel, l. ii. c. xvi. ss. 245-61.

receiver has been contented with the surety, of the nature of which he was aware(*o*) at the time of accepting it.

A more common and as it should seem a better pledge, is the retention of a place or fort until such time as the condition of the Treaty be fulfilled. This pledge or pawned thing may be what is legally called moveable [* 69] property (*donner des gages.*) *Poland once placed her Crown Jewels in the hands of Prussia. Or the pledge may consist of immoveable property (*donner en engagement :*) they may not be actually placed in the possession of the creditor State, but assigned over by some instrument without actual delivery, which hypothecates them; but this is an unusual transaction between States.

The State which holds the pledge is bound to preserve it in good condition, but may, if the stipulated time elapse without the payment of the debt or the fulfilment of the condition, appropriate it. The House of Savoy hypothecated the *Pays de Vaud* to the Cantons of Berne and Freybourg, and on non-payment of the debt they forcibly seized and retained the territory.(*p*)

Having disposed of that species of guarantee which relates to hostages, pledges, and hypothecations, we have now to consider that kind of security which is more usually comprised under the term Guarantee.

[*70]

*CHAPTER VII.

TREATIES—GUARANTEE.

LVI. (*a*) TREATIES may concern not only the contracting parties, (*b*) but third parties who may or may not be literally contracting parties in the first instance, but the protection of whose interest, or the maintenance of whose (*c*) *status*, may be the object of the Treaty. The consideration of such Treaties brings us to the very delicate question of Guaranteeship.

The following heads appear to comprise the principal classes of Guarantee :(*d*)—

1. A Guarantee that a nation shall maintain a particular *status* towards

(*o*) Vattel, l. ii. c. xvi. s. 255.

(*p*) Günther, ii. 154.

Vattel, l. ii. c. xvi. ss. 241–244.

Klüber, s. 156.

(*a*) Deutsches Staats-und Bundesrecht von Zachariä, i. 129–137, should be consulted for the Guarantee of the German Confederation, both from *within* and *without*. See, too, Schmauss, Corp. Jur. Publ. 1079.

(*b*) By the Treaty of Aix-la-Chapelle (1748,) the eight contracting parties mutually guaranteed each other's dominion.

(*c*) Vide ante, vol. i. p. 132-3.—Intervention as to incorporation of Italian States of Austria in the German Confederation without consent of the Powers who signed the Treaty of Vienna.

(*d*) See the remarkable modern instances of Belgium and Greece, vol. i. pp. 100, 105.

all other powers, e. g. of neutrality, which is a condition of the newly erected kingdom of Belgium.(e)

*2. A Guarantee that a particular State shall do a particular act, e. g. discharge a debt, or resign a territory. [*71]

3. A Guarantee to defend the particular constitution or territory, or particular rights, of a country, *contra quoscunque*.(f)

4. A Guarantee to defend the particular constitution of a State generally against all attacks which may assail it, whether Foreign and External or Domestic and Internal.

Such a Guarantee, being an engagement which binds a foreign power to take part in the civil quarrels of an Independent State, appears to be in theory not consistent with the perfect and uncontrolled freedom which is of the essence of such a State, and in practice to have proved too often fatal to her liberties and to her very existence.

Having regard, however, to the Treaties of Guarantee relating to the Protestant Succession in England, which will be presently mentioned, it seems impossible to deny, that such a Right of Intervention(g) has been, and may be conceded by one nation to another, without entailing the loss of legal personality in the nation which concedes it,—without reducing that nation to the *status* already discussed,(h) of a State so protected as to be dependent.

This is a construction of Guaranteeship opposed certainly to every presumption of public law, and one which can only be created—if, according to modern practice and usage, it can be created at all—by express words. Such a Treaty is fraught with mischief to the best interests both of Public and International Law.

The constitutions of the greatest as well as of the smallest States, have been at different periods of history the subject of *Guarantees, especially against any invasion from Third(i) Powers, [*72] and perhaps in some cases the terms have not extended the principle of intervention beyond this limit.

The British, the Austrian, the Spanish Empires, as well as the States of Poland, Geneva, and of minor German principalities, have been all examples of the application of this principle.

LVII. At the Peace of Westphalia, 1648, France and Sweden, as well as the various principalities which composed the German Empire,

(e) Vide ante, vol. i. p. 104.

Vattel and other writers make a distinction between *caution* (Surety) and *garant* (Guarantee.) In the former case, the surety must make good the default of the principal; in the latter the guarantee is only bound to do his utmost to obtain the performance of the principal. It would manifestly require an express provision to constitute the Guarantee of a Treaty a Surety in this sense for the performance of its conditions. The distinction, therefore, is not taken in the text of this work.

(f) Vide post, construction of this term.

(g) It is, perhaps, partly to be inferred from the careful and express renunciation of any such right on the part of the Powers who guaranteed the kingdom of Belgium. Vide post, p. 78.

(h) Vide ante, vol. i. pp. 91–4.

(i) Vattel, l. ii. c. xvi. ss. 235–239.

Klüber, ss. 157–8.

Wheaton, pt. iii. c. ii. 12.

became Guarantees for that first great settlement of Europe, from which a considerable portion of Modern International Law derives its origin. Guaranteeship of this kind was then a device of comparatively recent date for securing fidelity to International engagements, having succeeded to the more feudal and coarser expedient of appointing Neutral Princes and Free Towns Conservatores of Treaties.

The Guarantee undertaken by France and Sweden, at this Treaty, would seem to have necessitated their intervention in the internal affairs of another nation ; for the obligation imposed upon all the "contractans et garans," as they were called, is set forth in the 116th Article of the part of the Treaty signed at Munster, and in the 17th Article of the part signed Osnaburgh is thus expressed : "Que tous ceux qui ont part à cette transaction soient obligés de défendre et protéger, tous et chacun, les [*73] lois ou conditions de cette paix, ^(k) contre qui *que ce soit, sans distinction de religion ; et s'il arrive que quelque point en soit violé, l'offensé tâchera premièrement de détourner l'offensant de la voie de fait, en soumettant la cause à une composition amiable, ou aux procédures ordinaires de la justice ; et si, dans l'espace de trois ans, le différend ne peut être terminé par l'un ou l'autre de ces moyens, que tous et chacun des intéressés en cette transaction soient tenus de se joindre à la partie lésée, et de l'aider de leurs conseils et de leurs forces à repousser l'injure, après que l'offensé leur aura fait entendre que les voies de douceur et de justice n'ont servi de rien ; sans préjudice toutefois au reste de la juridiction d'un chacun, et de l'administration compétente de la justice, suivant les lois et constitutions de chaque prince et état." ^(l)

In the Treaty of Hanover, concluded in 1725 between Great Britain and Prussia, this Guarantee is expressly recited and confirmed ; ^(m) and in 1792, the first intervention of Austria and Prussia, ⁽ⁿ⁾ in the war of the French Revolution, was founded upon the obligations contracted by these States in 1648, at the time when France obtained the sovereignty of Alsatia ; the German sovereigns were invoked in 1792, as the guarantees of the Treaty of Westphalia, to protect the private property and rights of jurisdiction of the minor German princes in Alsatia. Upon

^(k) This is a clause usually termed "*contra quoscunque*." Dr. Twiss (Duchies of Schleswig and Holstein, pp. 124-5,) observes : "No rule of International Law is more clear than that the convention of guaranty does not apply to the case of political changes. If, for instance, Denmark had guaranteed to the Princess Anne of England the undisturbed possession of the British throne upon the death of William III. *contra quoscunque*, no *casus fœderis* would have arisen if the Highlanders of Scotland had attempted to restore the Crown to the son of James II. ; but if Louis XIV. or Philip V., as Foreign Powers, had sent an army to co-operate with the insurgents in depriving the Princess Anne of the succession, there would have been at once an undeniable *casus fœderis*. Even an expression so indefinite as *contra quoscunque* is limited by the nature of the subject-matter ; it may apply to the slightest international interruption, from whatever quarter it may be threatened ; but even a Civil War will not extend its operation to political troubles."—Sed vide post, pp. 75-6-7 ; and see Vattel, l. ii. c. xiii. s. 197. "On doit sans doute défendre son allié contre toute invasion, contre toute violence étrangère, et même contre des sujets rebelles."

^(l) Dumont, Rec. des Tr. vol. iii. p. 562.

^(m) Schmauss, 2014.

⁽ⁿ⁾ De Martens, 2, l. viii. s. 338, and note (a).

this Treaty also, Russia has more than once rested her claim to interfere in the arrangement of the German constitution.(o)

*LVIII. The Treaty of Teschen in 1779 closed the war which had broken out in 1777, with respect to the succession to the [*74] kingdom of Bavaria, and renewed by its 12th Article the Treaty of Westphalia. This Treaty of Teschen was concluded under the mediation, specially invoked by the contending parties, of France and Russia, and by the 16th Article of it these mediatorial Powers were constituted Guarantees of its provisions; one of which, as has been stated, was the renewal of the Treaty of Westphalia.

LIX. By the 12th Article of the Treaty of Vienna, concluded between Austria and Spain in 1725, the latter country bound herself to guarantee the order of succession in Austria commonly called the Pragmatic Sanction, *garantigiare quoque spondet eum succedendi ordinem, quem sua Majestas Cæsarea, &c., declaravit et stabilivit.*(p) France bound herself to the same Guarantee by the 10th Article of the Treaty of Vienna, 1738. Austria, on the other hand, reciprocally guaranteed the Order of Succession to the throne of Spain, in the same Article of the same Treaty of Vienna, 1725. Prussia also, under Frederick William I., guaranteed her Pragmatic Sanction. The result tends to justify the remark of Frederic the Great, that Guarantees were like filigree work, better to look at than *to use.(q) Scarcely had the Emperor Charles VI. closed his eyes in death, before the vanity of his [*75] elaborate attempts to engage all nations to secure to his daughter, Maria Theresa, the undivided inheritance of her father, was fully manifested. Every one of these nations, upon the most frivolous pretexts, disowned the obligations of the solemn Treaty by which they had bound themselves.(r)

The character of the Guaranteeships undertaken by the great European Powers with reference to the Duchies which form an integral part of the Crown of Denmark,(s) underwent much discussion at a very recent period. These Treaties were—

1. The Treaty containing the British Guarantee, 1720.
2. The Treaty containing the French Guarantee, 1720.

(o) Wheaton's Hist. 346, and 350.

(p) "Sua Majestas Cæsarea adpromittit, ordinem succedendi in regno Hispaniæ receptum, atque per tractatum Trajectensem, per renunciaciones, item vi quadruplicis fœderis subsecutas, nec non per præsens pacis instrumentum confirmatum, tueri se, garantiamque desuper præstare, et quoties opus, manutenere velle; vicissim Rex Hispaniæ tueri, et garantigiare quoque spondet, eum succedendi ordinem, quem sua Majestas Cæsarea ad mentem majorum suorum in serenissima sua domo ex pactis ejusdem antiquis, in forma perpetui, indivisibilis, ac inseparabilis fidei commissi primogenitura affecti pro universis suæ Majestatis utriusque sexus Hæredibus, et successoribus declaravit et stabilivit, quique subinde ab ordinibus, et statibus universorum Regnorum, Archiducatum, Ducatum, Principatum, Provinciarum, ac ditionum, ad serenissimam domum Austriacam jure hæreditario spectantium, communi omnium voto susceptus, ac grato, submissoque animo agnitus, atque in vim legis sanctionisque pragmaticæ perpetuo valituræ in publica monumenta relatus fuit."—Schmauss, t. i. 1986-7.

(q) "Toutes les garanties de mon temps sont comme l'ouvrage de filigrane, plus propre à satisfaire les yeux qu'à être de quelque utilité."—Histoire de mon Temps (Œuvres Posthumes,) t. i. c. ix. p. 229, cited by De Martens, l. ii. c. ii. s. 63, n. (b).

(r) Wheaton, Hist. pp. 166-170.

(s) Vide note ante, vol. i. p. 464.

3. The Treaty of Copenhagen, 1727.

4. The Treaty containing the German and Russian Guarantee, 1732.(t)

LX. When the Parliament of the British Empire had settled the succession to the throne, after the death of Queen Anne, upon the Princess Sophia, Electress and Duchess Dowager of Hanover (the granddaughter of James I.,) and upon her issue, with the condition that they should be members of the Church of England, the Government were unhappily not content with this domestic pledge for the security of the liberties of their country, but insisted on its receiving the Guarantee of the Powers, who became contracting parties to many of the Treaties which were entered into from the year 1713 to the Peace of Aix-la-Chapelle in 1748; and such a Guarantee was accordingly rendered by France, Austria, Spain, and especially by Holland, in the Treaty of 1713, called the [*76] Treaty "of the Guarantee of the *Protestant Succession and of the Dutch Barrier," in the second article of which the statute of William III. is recited.(u)

LXI. It may be well to cite in this place the opinions of two eminent persons, both with no mean pretensions to be heard upon any question of International Jurisprudence, upon the conduct of Great Britain in this respect.

The Abbé de Mably remarks : (v)

"Il est surprenant que dans le moment que les Anglois changent leurs Loix de succession, qu'ils excluent les Stuarts du trône, et qu'ils sentent l'avantage de soumettre le Prince à la nation, ils se lient eux-mêmes les mains, en voulant que toute l'Europe s'engage à maintenir et à défendre les actes que leur Parlement a passés en faveur de la Maison de Hanover. Cette conduite ne sembla pas prudente aux personnes qui sont instruites des loix, des principes, et des intérêts des Anglois. Ils devoient se borner à exiger de leurs voisins qu'ils ne se mêleraient en aucune façon de leur gouvernement; et qu'ils ne favoriseraient en aucune manière les personnes qui seroient des entreprises contraires aux actes du Parlement." Quite in accordance with this opinion is that of Mr. Jenkinson, afterwards Earl of Liverpool, expressed in his celebrated defence of the conduct of Great Britain, in 1758 : (x)—"The second species of defensive alliance, which subsists between Great Britain and Holland, is that which was first agreed to, in the Treaty of Barrier and Succession of October 29, 1709; and again more particularly stipulated in another treaty, to the same purpose, of January 29, 1713. The design of this treaty is the guaranty of the Dutch barrier on the one part, and the [*77] guaranty of the firmest barrier of British liberty—the Protestant *succession—on the other. The stipulations are, 'that in case either should be attacked, the other should furnish, at the requisition of the party injured, but at his own expense, certain succours there

(t) Twiss, Duchies of Schleswig and Holstein, pp. 120–151.

(u) St. 12 & 13 Wm. III. c. 2.

Schmauss, 1288.

(v) Droit Public, t. ii. p. 156.

(x) Remarks of the Earl of Liverpool, in Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations, pp. 75–6.—Cabinet of Scarce and Celebrated Tracts, published at Edinburgh.

expressed; and if the danger should be such as to require a greater force, that he shall be obliged to augment his succours, and ultimately to act with all his power in open war against the aggressor.' I pretend not to make any use of this Treaty in the present case, and only mention it to give a fuller view of the alliances which subsist between us. Here, however, I will indulge a wish, that the case of this guaranty, as far as it relates to the rights of the Crown of Great Britain, may never again exist. *I always read with sorrow that there ever was a time when the unfortunate dissensions of our people, in a point where the whole of their happiness was concerned, should have made it necessary to add any other sanction to our laws, or any other security to our constitutional rights, than such as our own power can afford them; these days, however, of shame now, I hope, are passed."*

LXII. The doctrine and practice of Guaranteeship, in its proper sense, *i. e.* against third powers, has not expired with the last Treaty of Vienna; our own times furnish us with two instances, as memorable as any that preceded them, in the newly-created kingdoms of Greece(*y*) and Belgium.

By the 4th article of the Treaty concluded at London in 1832 between France, Great Britain, Russia and Bavaria, it is provided "that Greece, under the Sovereignty of Prince Otho and the Guarantee of the three Courts, shall form a monarchical, independent State." The other conditions of the Treaty, especially the limitations which follow with respect to the future succession to the throne, and the condition that the crown of Greece shall never be worn by the Sovereign of any other country, are of course equally under the Guarantee of these Powers.(*z*)

*LXIII. By the Treaties between Austria, France, Great Britian, Prussia, Russia, Holland and Belgium, signed at London [**78*] on the 19th of April, 1839, it is declared that "*La Belgique formera un état indépendant et perpétuellement neutre. Elle sera tenue d'observer cette neutralité envers tous les autres états.*" From the period of the breaking out of the Revolution at Brussels in 1830 till this concluding Treaty, a variety of negotiations and a vast number of protocols passed between the Powers just mentioned, relative to the separation of Holland and Belgium; and on the 15th of November, 1831, a Treaty was concluded which was in all its essential parts literally the same as that of 1839. All these negotiations and protocols, as well as the Treaties of 1839, show that the peculiar constitution of Belgium, as an independent but perpetually neutral state, is under the Guarantee of the Five great Powers, and the arrangements with respect to the Duchy of Luxemburg are also under the Guarantee of the Germanic Confederation.

It should be observed that during the progress of the negotiations respecting Belgium, the intention of future interference with the internal and domestic affairs of that kingdom was distinctly disclaimed by the Guarantees.(*a*)

(*y*) Vide ante, vol. i. p. 105.

(*z*) Ib. p. 100.

(*a*) See Letters of Austria, Russia, Prussia, and England, to France.—Belgium Papers, p. 69.

[*79]

*CHAPTER VIII.

INTERPRETATION OF TREATIES.(a)

LXIV. (b) ALL International Treaties are covenants *bonæ fidei*, and are, therefore, to be equitably and not technically construed.(c)

LXV. The imperfection of language as an instrument of expressing intention must occasionally, if there were no other reason, render interpretation necessary.(d)

[*80] *But in truth there are other reasons; in all laws and in all conventions the language of the rule must be general, and the application of it particular. Moreover, cases arise which have, perhaps, not been foreseen, which may fall under the principle, but which are not provided for by the letter of the law or contract. Circumstances may give rise to real or apparent contradictions in the different dispositions of the same instrument, or of another instrument, *in pari materiâ*, which may require to be reconciled. These are difficulties which may arise between contracting parties disposed to act honestly towards each

(a) The authorities principally relied upon in this Chapter are—

INTERNATIONAL JURISTS.

Grotius, l. ii. c. xvi.
Puffendorf, l. v. c. xii.
Vattel, l. v. c. xii.
Rutherforth, B. ii. c. vii.

COMMENTATORS ON THE ROMAN LAW.

ANCIENT.

Donellus de Jur. Civ. l. i. c. xv.
Pothier on Obligations, p. i. c. i. art. vii., translated and amplified by Evans, vol. p. 53; vol. ii. p. 35, number 5.
Domat. Prél. t. i. s. 2; tr. ch. 12.

MODERN.

Savigny, R. R. i. Viertes Kapitel,
Muhlenbruch, Doctrina Pandect. i. ss. 58-65, s. 115.

PUBLICISTS.

Suarez, De Leg., &c. l. vi.
Story on the American Constitution, vol. i. c. v.

WRITERS ON ENGLISH LAW.

Broom's Legal Maxims, c. viii. The Interpretation of Deeds and Written Instruments.

Bacon (Matthew,) Abridgment, tit. Statutes, i. Rules to be observed in the Construction of a Statute.

Wildman's International Law, i. pp. 177-185.

(b) Grot. l. ii. c. xvi. De Interpretatione.

(c) Ib. ii. 1. "Discrimen actuum bonæ fidei et stricti juris, quatenus ex jure et Romano, ad jus gentium non pertinet."

Maltass v. Maltass, 1 Robertson's Reports, p. 76.

(d) "Sed quia interni actus per se spectabiles non sunt, et certi aliquid statuendum est, ne nulla sit obligatio, si quisque sensum quem vellet sibi affigendo liberare se posset; ipsa dictante naturali ratione jus est ei, cui quid promissum est, promissorem cogere ad id quod recta interpretatio suggerit, nam alioqui res exitum non reperiret: quod in moralibus pro impossibili habetur."—Grotius, l. ii. c. xvi. s. 1.

other. But they may not be so disposed; one of them may endeavour to avoid his share of the mutual obligation. Indeed there is no need for *à priori* reasoning on a subject amply demonstrated, both in the covenants of individuals and the Treaties of States, to be a matter of practical necessity.

LXVI. The interpretation is the life of the dead letter; but what is meant by the term "interpretation?" The meaning which any party may choose to affix? or a meaning governed by settled rules^(e) and fixed principles, originally deduced from right reason and rational equity, and subsequently formed into laws? Clearly the latter. The necessities of the great society of States as much demand such laws for the exposition of their Treaties, as the necessities of each individual State for the covenants of their subjects. The rules by which International covenants are interpreted, have been collected by jurists both in the Roman law itself, by commentators upon that law, and in the writings of International Jurists. Grotius, Puffendorf, Vattel, and Rutherford, have each written chapters upon this subject, which have obtained general approbation from their manifest equity of *the doctrines which they contain, and the clear manner in which they are expressed. [*81] But great advantage is to be derived from the writings of Suarez and Donellus, Pothier and Domat, who have treated the subject of the interpretation of laws and covenants in a manner, which combines the profoundest reasoning with the most perspicuous arrangement. The value of such writers, as expounders of International as well as of Public Law, has already been dwelt upon.^(ee)

Sound principles upon this subject are moreover to be found scattered up and down the pages of the Roman Law, with respect to the interpretation of contracts,^(f) laws, and testaments. The Roman lawyers were, indeed, apt to confound the limits of *interpretation* and of *explanation by a new law*, but they were careful not to apply to the Public Treaty (*publica conventio*)^(g) the peculiarities attending the forms and rules of the private covenant.^(h) There is a manifest distinction between Laws, and Covenants or Treaties, which modifies in some degree the application of the rules of interpretation, transferred from the former to the *latter. The Law enacted by the Supreme Power of the State is [*82]

(e) Vattel, ib. s. 265.

(ee) Vol. i. p. 35.

(f) Savigny remarks, in a very recent work (*Obligationenrecht*, II. 189,) that with respect to contracts, these principles are of a very general character, and scarcely afford any aid beyond that which an intelligent and dispassionate consideration of each particular case would discover. This may be so; but the circumstance adds to their value as rules of Interpretation of Contracts between States having no common superior.—Vide ante, vol. i. c. ix.

(g) Dig. ii. 14, 5. De pactis.

(h) Gaius, iii. 94. Having remarked that only Roman citizens could validly contract in the formula, "Spondes? Spondeo," continues, "Unde dicitur, uno casu hoc verbo peregrinum quoque obligari posse, velut si Imperator noster Principem alicujus peregrini populi de pace ita interroget: Pacem futuram spondes? vel ipse eodem modo interrogetur. Quod nimium subtiliter dictum est: quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli res vindicatur." This passage is cited by Savigny, R. R. i. 310, n. c. It affords an additional proof that the Romans were not ignorant of International Law.—Vide ante, vol. i. Pref. vii. viii.: p. 31, &c.; App. I.

to be interpreted according to the intention of that *one* power. The Covenant or Treaty contracted by *two or more* parties is to be interpreted with reference to the intention of them *all*—"conventio seu pactio est *duorum vel plurium in idem placitum consensus*."(*i*) It is proposed to give a concise statement of those leading principles and rules, which appear to be sanctioned by the reason of the thing, by usage, by the authority of jurists, and by the rules and analogies of the Roman Law, (*k*) with respect to the interpretation of Treaties.

LXVII. The general heads under which, for the sake of perspicuity, we may range the principles and rules of Interpretation, are the following:—

α. Authentic Interpretation, that is, the exposition supplied by the Lawgiver himself. (*l*)

β. Usual Interpretation, that which is founded upon usage and upon precedent.

γ. Doctrinal Interpretation; that which is founded upon a scientific exposition of the terms of the instrument, and which, according to many jurists, is the only interpretation properly so called. This again admits of a sub-division into, 1. Grammatical, and, 2. Logical exposition.

LXVIII. *Authentic Interpretation*, in its strict sense, means the exposition given by the Lawgiver himself; so far it is, of course, inapplicable to the case of Treaties; but this kind of interpretation generally takes the form of a *new* law, reciting and removing the doubts of the old one; and this mode of interpretation may, of course, be adopted in the case of [*83] Treaties. The contracting powers may promulgate a subsidiary *and explanatory Treaty, the preamble of which, like the preamble of a Statute, may be declaratory with respect to existing doubts upon the construction of a former convention. But this is, in fact, not so much a particular mode of Interpretation, as the enactment of a new law, or the conclusion of a new Treaty, as the case may be.

LXIX. *Usual Interpretation* is, in the case of Treaties, that meaning which the practice of nations has affixed to the use of certain expressions and phrases, or to the conclusions deducible from their omissions, whether they are or are not to be understood by necessary implication. A clear usage is the best of all interpreters between nations, as between individuals; and it is not legally competent to either nation or party to recede from its verdict. (*m*)

(*i*) Dig. ii. 14, I. 1.

Bowyer's Third Reading.

(*k*) Vide ante, vol. i. cc. iii. viii. pp. 14—64.

(*l*) Cod. i. 14, 12. "Tam conditor quam interpres legum solus Imperator justè existimabitur."

(*m*) "Minimè sunt mutanda, quæ interpretationem certam semper habuerunt."—Dig. I. 3, 23.

"Si non appareat quid actum est: erit consequens ut id sequamur quod in regione in quâ actum est frequentatur."—Ib. L. 17—34.

"In obscuris inspicere solet, quod verisimilius est, aut quod plerumque fieri solet."—Ib. 114.

"Si de interpretatione legis quæretur, in primis inspiciendum est quo jure civitas

LXX. *Doctrinal Interpretation* is, as has been said, either, 1. Grammatical or Philological; or, 2. Logical; and first,—

As to *Grammatical Interpretation*, we must not confound *translation* and *etymology* with interpretation. It has been well observed⁽ⁿ⁾ that though it may not be easy to determine with exact precision where the province of the grammarian and the lexicographer ends and that of the interpreter begins, and though their provinces may be scarcely distinguishable upon their confines, yet that in their remotest extremities, and for practical purposes, they are sufficiently distinct. A competent knowledge of the language in which the covenant is *written is, in fact, necessarily supposed to precede or accompany the work of [*84] interpretation; and with respect to etymological refinements, they can but rarely have any place in the legitimate construction of a law or contract: the meaning of the words employed by the lawgiver, or by the parties, is to be sought in the common usage and custom, which indicate the consent of those who use them, that they should bear a particular meaning.^(o)

It certainly may happen, that the meaning affixed by contemporaneous use and practice, upon the particular words employed, may have undergone, through lapse of time and change of fashion, so much subsequent alteration, that the due construction of the instrument, may require a knowledge of the antiquated as well as of the present use of the words, though such an instance would probably be of an exceptional character. There are, however, certain general rules of *literal interpretation*, which have been sanctioned by all jurists, and which should be mentioned in this place.

1. The principal rule has been already adverted to, namely, to follow the ordinary and usual acceptation, the plain and obvious meaning of the language employed. This rule is, in fact, inculcated as a cardinal maxim of interpretation equally by civilians, and by writers on International Law.

Vattel says that it is not allowable to interpret what has no need of interpretation. If the meaning be evident, and the conclusion not absurd, you have no right to look beyond or beneath it, to alter or add to it by conjecture. Wolff observes, that to do so is to remove all certainty from human transactions.^(p) To affix a particular sense, founded on etymo-

retro in ejusmodi casibus usa fuisset: optima enim est legum interpretres consuetudo.—Ib. i. 3, 37.

"Nam Imperator noster Severus rescripsit: in ambiguitatibus, quæ ex legibus proficiscuntur, consuetudinem, aut rerum perpetuò similiter judicatarum auctoritatem, vim legis obtinere debere."—Ib. 38.

⁽ⁿ⁾ Rutherforth, b. 2, c. vii.

^(o) Rutherforth, b. 2, cc. 7—9.

^(p) "Standum omnino est iis, quæ verbis expressis, quorum manifestus est significatus, indicata fuerunt, nisi omnem a negotiis humanis certitudinem remove volueris."—Jus Nat. part vii. n. 822.

"Non aliter a significatione verborum recedi oportet, quam cum manifestum est, aliud sensisse testatorem."—Dig. xxxii. i. 69.

Upon this passage, Donellus remarks, "De testatore hoc scriptum est in l. non aliter. D. de leg. 3, sed multò magis ad legislatores pertinet, qui intelligentes cum sint, et in commune quid præcipiant et consulant, dant operam, ut quàm maximè significantur et perspicuè loquantur, ut intelligantur ab iis, quibus consultum, et quos eosdem legi parere volunt, ac propter peritiam loquendi et doctrinam rerum

[*85] logical *or other reasons, upon an expression, in order to evade the obligation arising from the customary meaning, is a fraudulent subterfuge aggravating the guilt of the *foedifragous* party, "*fraus enim adstringit non dissolvit perjurium.*"(q) Vattel cites as instances of such conduct, the act of a Turkish Emperor, who having promised a man to spare his head, caused him to be cut in two, through the middle of the body; and the act of Tamerlane, in ordering the soldiers, whose blood he had promised not to shed, to be buried alive.

In such cases as these, the fraud is flagrant; but the principle, by which they are condemned, applies to all cases in which an attempt is made,

"To palter with us in a double sense,
To keep the word of promise to our ear,
And break it to our hope."(r)

2. The construction is to be derived from a due consideration of the language of the whole instrument, and not from that of particular portions or sentences(s) of it, or in the language of Donellus,(t) "*antece-dentia ipsius legis et sequentia in primis spectanda, ex his ambiguitas sæpe explicatur.*"(u)

[*86] *It may be necessary to affix a different signification to the same term in different parts of the same instrument, the term being construed according to the subject-matter, *pro subjectâ materiâ*.(x) Vattel illustrates this position by an example, showing that the word *day* might be employed in two meanings in one and the same Treaty. It might be stipulated in a Treaty that there should be a truce for fifty *days*, upon the condition, that during eight successive *days* the belligerent parties should, through their agents, endeavour to effect a reconcili-

multò facilius id consequi possunt, quàm privati testatores. Unde intelligimus, si verbum idem propriè quid significet, et aliud impropriè seu abusive, propriam significationem verbi sequendam esse. Sed hoc, ut dixi hactenus, nisi appareat aliud sensisse legem."—Comm. De Jur. Civ. i. c. 15, 9, 43.

"Verbum hoc: *si quis*, tam masculos quam feminas complectitur."—Dig. L. 16, 1. (De Verborum significatione.)

"Nurus appellatio etiam ad pronurum et ultra porrigenda est."—Ib. L. 16, 50.

(q) Cic. de Off. l. 3, c. 32, 113.

(r) Macbeth, Act V. sc. vii.

(s) Vide ante, vol. i. p. 224.

(t) Comm. de Jur. Civ. i. 15, p. 43.

(u) "*Incivile est, nisi totâ lege perspectâ, unâ aliquâ particulâ ejus propositâ judicare vel respondere.*"—Dig. i. 3, 24.

"*Incivile, id est iniquum et contra jus.*"—Donellus, Comm. de Jur. Civ. l. 13, p. 32.

Vattel, l. 2, c. 17, 285.

(x) "*Præter hæc multa reperimus tractata et de petitione hereditatis, et de distractis rebus hereditariis, et de dolo præterito, et de fructibus, de quibus, quum forma senatusconsulto sit data, optimum est, ipsius, senatusconsulti interpretationem facere, verbis ejus relatis.*" Then follow the words of the S. Consultum, and the rule deduced is, "*Aptanda est igitur nobis singulis verbis senatusconsulti congruens interpretatio.*"—Dig. v. 3, 20, 6.

"*Utrum autem omne pretium restituere debbit bonæ fidei possessor, an vero ita demum, si factus sit locupletior? videndum; finge pretium acceptum vel perdidisse, vel consumsisse, vel donasse. Et verbum quidem: pervenisse, ambiguum est, solumne hoc contineat, quod prima ratione fuerit, an vero et id, quod durat? Et puto sequentem, clausulam senatusconsulti sequendam, etsi hæc sit ambigua, ut ita demum computet, si factus sit locupletior.*"—Ib. s. 23.

ation; the *fifty days* of the truce would be *days* and *nights*, or *days* of twenty-four hours, according to the ordinary legal computation; but it would be irrational to contend that the condition would not be fulfilled unless the agents of the belligerent parties were, during the *eight days*, to labour night and day without intermission.

3. Words of art, or technical words are to be construed according to their technical meaning. This is as universal a maxim as any that can be found in jurisprudence. It finds its application in International Jurisprudence chiefly upon questions of geographical or local distinctions. (y)

LXXI. The principles which have been laid down may suffice for the due interpretation of those Treaties, in which the language clearly expresses the intention of the contracting *parties, and with respect to which there is no circumstance which prevents us from recog- [*87]
nizing this intention so expressed, as containing the true meaning of the contract.

LXXII. We have now to consider those cases in which the language(z) employed gives rise to a doubt as to the *intention* of the contracting parties, and therefore requires for its elucidation a *logical* interpretation. This doubt may be occasioned either by the *uncertainty* or by the *impropriety* of the language.

Each of these divisions may admit of separate rules of interpretation. There are, however, certain general rules which may be said to be equally and without distinction applicable to both.

LXXIII. (a) First,—The rule which has already been adverted to, of deriving the interpretation of a particular passage from a comparison with the whole context of the instrument, and which mode of interpretation belongs as much to the *logical* as to the *grammatical* division of the subject. Mr. Wildman illustrates this position by the following example:—"The ninth article of the Treaty of Utrecht provided, that the port of Dunkirk should be destroyed: '*Nec dicta munimenta portus moles aut aggeres denuo unquam reficiantur.*' The plain intention of this stipulation was, to prevent the existence of a French port of military equipment in the midst of the Channel. The King of France, while he was destroying the port of Dunkirk, *in accordance with the article of the Treaty, was constructing at Mardick, at the dis- [*88]
tance of a league, another port of greater dimensions and importance. The English Government remonstrated upon the absurdity of putting such a literal construction upon the article as would entirely defeat its object;(b) and the French Government ultimately acquiesced, and dis-

(y) Grot. II. 16, 13, III. 20, 33. Vattel, iv. s. 33. Sir L. Jenkins, ii. 736.

(z) "*Scripti et voluntatis frequentissima inter consultos quæstio est: et pars magna controversiæ juris hinc pendet.*"—Quintil. Inst. Orator, lib. vii. c. 6.

(a) "*Deprehenditur sententia angustior seu lex plus scripsisse, minus sensisse, quatuor ex rebus; quarum in singulis si verba ex sententiâ temperari, nec longius produci animadverterimus, tum veram esse legem interpretationis quam dixi intellegimus. Deprehenditur igitur ex his rebus: (1.) ex aliis partibus ejusdem legis; (2.) ex ratione legis; (3.) ex æquitate; (4.) ex aliis legibus. Quæ omnia cum ad sententiam et vim legis cognoscendam pertineant, diligenter in omnibus rebus quærenda et spectanda sunt.*"—Donellus, Comm. de Jur. Civ. i. 13, p. 31.

Dig. L. 16, 126, contains a good illustration of the rule.

(b) Grotius, ii. 16, xx. 2, 3.

continued the works.(c) It was stipulated by the fourth article of the Treaty between France and England, concluded at the Hague in 1777, that no new port should be formed within two leagues of Dunkirk and Mardick.”(d)

Secondly,(e)—The rule of considering the ground or reason (*ratio legis*) in which the Treaty originated, and the object of those who were parties to it. This is a less safe and less certain mode of interpretation, and one which requires more caution in its use and application.

Thirdly,—The rule of instituting a comparison between the Treaty in dispute and other Treaties, whether prior, posterior, or contemporary, upon the same subject and between the same parties. This is a source from which the intention of the contracting parties may generally be fairly and safely derived; at all events it may be derived from this source in a less suspicious manner, than from a reference to those facts and circumstances, (themselves, perhaps, a matter of dispute,) which immediately preceded the conclusion of the Treaty.(f)

[*89] *Fourthly,—The rule of having regard to the consequences, to the justice or injustice, advantage or disadvantage, which would ensue from affixing a particular meaning to the doubtful expressions.

This is, indeed, a mode of interpretation to which recourse must be still more sparingly and more cautiously had.

Fifthly,—When a provision or clause in a Treaty is capable of two significations, it should be understood in that one which will allow it to operate, rather than in that which will deny to it effect.(g) Thus, according to Municipal Law, if in a partition between *Peter* and *Paul*, it is agreed that *Peter* shall have a way over *his land*, though in strict grammatical construction this would mean *his own land*; yet as in that sense the agreement would be nugatory, it must be construed to mean the land of *Paul*.(h) This rule is perhaps a corollary from that which

(c) Flass. iv. 388, et seq.

(d) Wildman's Intern. Law, vol. i. p. 178.

(e) “Si generalem aliquam orationem legis alia pars ejusdem legis nominatim non mutabit, aut minuet: secundo loco *ratio legis* consulenda est. Ex hac præcipue voluntas et sententia legis perspicitur. Quinimo ratio nihil est, nisi voluntas legis: siquidem ratio et causa legis est id, quod lex sibi propositum habuit, ut legem constitueret; id, propter quod lex lata est, et sine quo lata non esset; denique quod lex in jure constituendo consequi voluit.”—Donellus, Comm. de Jur. Civ. i. 13, p. 32. Grot. ii. 16, 8.

(f) “Non est novum, ut priores leges, ad posteriores trahantur.”—Dig. i. 3, 26.

“Ideo, quia antiquiores leges ad posteriores trahi usitatum est, semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas, et ad eas res pertineant, quæ quandoque similes erunt.”—Ib. 27.

“Sed et posteriores leges ad priores pertinent, nisi contrariæ sint; idque multis argumentis probatur.”—Ib. 28.

(g) “Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, quæ de agitur, in tuto sit.”—Dig. xlv. i. 80.

(h) Pothier (Evans' transl.) i. p. 54.

“Si tibi pecuniam donassem, ut tu mihi eandem crederes, an credita fieret? Dixi in hujusmodi propositionibus non propriis verbis nos uti; nam talem contractum neque donationem esse, neque pecuniam creditam; donationem non esse, quia non ea mente pecunia daretur, ut omnimodo penes accipientem maneret; creditam non esse, quia exsolvendi causa magis daretur, quam alterius obligandi. Igitur si is, qui pecuniam hac conditione accepit, ut mihi in creditum daret accep-

has been already stated, viz., that the intention, rather than the words, of the contracting parties is to be considered. Both rest on the presumption of common sense, that no contract is entered into with the intention of being nugatory.(i)

Sixthly,—When the same provision or sentence expresses *two meanings, that one which most conduces to carry into effect the [*90] end and object of the Convention, should be adopted.(k)

Seventhly,—An ambiguity in the terms of a Convention may sometimes,—due regard being of course had to the subject-matter,—be explained by the common use of those terms in the country, with respect to which more especially the engagement is made.(l)

Eighthly,—The rule, that the influence and authority of *usage* in the interpretation of private covenants, is such, that *customary* clauses, though not expressed, are held to be contained therein, is in its spirit applicable to International covenants.(m)

LXXIV. We have now to consider the cases in which doubt arises from the *uncertainty* of the expression : and first, as to the nature of this uncertainty. It will generally be found to arise either from—1. *incompleteness* ; 2. or *ambiguity*.

LXXV. The *uncertainty* caused by *incompleteness*, partakes of the character of a speech interrupted, before the thought intended to be conveyed by it has been fully uttered.(n)

The Roman Law furnishes instances of such *incompleteness*, referring to cases in which the law has required a deed or act of business to be attested by witnesses, but has omitted to specify the number;(o) or where a testator has required a sum *of money to be paid, but [*91] omitted to specify the amount or the coin.(p)

LXXVI. The *uncertainty* arising from *ambiguity* is more important

tam dederit, non fore creditam ; magis enim meum accepisse intelligi debeo. Sed hæc intelligenda sunt propter subtilitatem verborum ; benignius tamen est, utrumque valere.”—Dig. xii. i. 20.

(i) “Omnia hominum facta ad scopum aliquem atque finem tendunt, unde sibi vel aliis utilitatem quandam expectant.”—Cic. de Fin. l. i. c. 10.

(k) “Quoties idem sermo duas sententias exprimit, ea potissimum accipietur, quæ rei gerendæ aptior est.”—Dig. L. 17, 67.

Compare also Dig. xxiv. i. 52. Dig. xix. ii. 15, 4. Dig. xix. ii. 18.

(l) “Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est. At si non appareat, quid actum est, erit consequens, ut id sequamur, quod in regione, in quâ actum est, frequentatur.”—Dig. L. 17, 34.

(m) “In contractibus tacitè veniunt ea quæ sunt moris et consuetudinis.”—Pothier (Evans’s Trans.) vol. i. p. 56. “In obscuris inspicere solet, quod verisimilius est, aut quod *plerumque* fieri solet.”—Dig. L. 17, 114.

(n) Savigny, R. R. i. 36.

(o) Nov. 107, c. 1. In the preface to this novel, it is remarked that the wills of testators were often so imperfectly expressed, that they required Diviners rather than Interpreters: “Εἰς τοσαντὴν ἀσάφειαν ἐξῆλθον, ὥστε μάντεων μᾶλλον ἢ ἐρμηνέων ταῦτα προσδεῖσθαι.” So the English lawyers have a maxim, “Divinatio non interpretatio est quæ omnino recedit a literâ.”

(p) “Et si plures fuerint testes adhibiti, sufficit solennem numerum exaudire.” . . . “Sed et si notam postea adjecerit legato vel sua voce vel litteris, vel summam, vel nomen legatarii, quod non scripserat, vel nummorum qualitatem, an recte fecerit? Et puto etiam qualitatem nummorum posse postea addi ; nam et si adjecta non fuisset, utique placeret conjectionem fieri ejus, quod reliquit, vel ex vicinis scripturis, vel ex consuetudine patrisfamilias vel regionis.”—Dig. xxviii. i. 21.

in its character and more frequent in its occurrence. It is of two kinds, 1. The *ambiguity* of *single* expressions (*singulorum verborum*;) 2. The *ambiguity* which springs from the general construction (*compositione orationis*) of the instrument.(q)

LXXVII. The *ambiguity* of *single* expressions arises when one object only is intended to be designated, but the expression used for the purpose embraces more than one. In civil affairs this happens more frequently with respect to the testaments and contracts of individuals, than with respect to public laws; but the Treaty or International Covenant, it must be remembered, partakes of the character both of a law and a contract. The Roman Law suggests as instances of this kind of ambiguity, testaments in which the slave *Stichus* is bequeathed as a legacy, *Titius* is named as legatee, and the farm of *Cornelius*(r) is the subject of the bequest; but there are several slaves named *Stichus*, several persons named *Titius*, several farms designated the farm of *Cornelius*.

[*92] Or it may happen that the expressions relate to some *abstract* **idea*, a class of things or persons, and then the ambiguity arises either from the fact, 1. that the expression used has *various* and *different* significations, like the expressions *puer*, *familia*, *potestas*, *præscriptio*, in the Roman Law.(s) 2. that it has a *restricted* (*stricta*,) and an *extensive* (*lata*) signification, as the words *cognatio*, *pignus*, *hypotheca*, *adoptio* had in the Roman Law.(t) The interpretation applied to these two kinds of ambiguity is usually called by jurists *declaratory* (*declarativa*.)

LXXVIII. The ambiguity which arises from the *general construction* (*compositione orationis*,) was not unnoticed by the Roman lawyers, both with respect to laws, and to the instruments of private business.

The former is, indeed, well illustrated by an instance which occurs in the Digest itself, in which the jurist, after stating various questions requiring the application of a principle of law, ends the paragraph by the words *mihi contra videtur*: the interpretation depends entirely on the question, whether these words relate to the *whole* of the foregoing paragraph, or to a *part* of it.(u)

[*93] Cicero(x) puts a well-known case of ambiguity relating to **private* instruments. In the direction given by a testator to his heir

(q) Donellus, Com. de Jur. Civ. i. p. 43.

Savigny, R. R. i. 36.

Dig. xxviii. 1, 21, 1, vide ante, n. 3.

(r) Dig. xxx. 39, 6.

(s) Savigny, R. R. i. s. 36.

Dig. L. 16, 195, *Familie appellatio—variè accepta est, nam et in res, et in personas diducitur, &c.*

Cod. iii. 39, 5. The word *præscriptio* is used to signify either a legal pleading, defensive plea, or prescription.

Ib. 5, 13. Use of the phrase, *si tamen extant*, may mean, if they are not destroyed, or if they have not been alienated by the husband (*extant apud maritum*.)

(t) Dig. i. 7, 1, s. 1. "Quod adoptionis nomen est equidem generale, in duas autem species dividitur," &c.

Ib. viii. 2, 23. "Quodsi ita sit cautum, ne luminibus officiatur, ambigua est scriptura, utrumne, his luminibus officiatur, quæ nunc sunt an etiam his, quæ postea quoque fuerint."

(u) Dig. xlv. 3, 2.

(x) "Ex ambiguo autem nascitur controversia, quum, quid senserit scriptor,

with respect to a certain weight of silver plate to be given to his (testator's) wife, the bequest being so worded that the collocation of the words (*quæ volet*) left it doubtful whether the selection of the *particular* plate rested with the heir or the wife. The rules of interpretation, it may be observed, which Cicero suggests are much the same as those which are laid down in this chapter.

LXXIX. However different these forms of doubt, arising from the incompleteness or ambiguity of an instrument, may be, they have this feature in common, that they offer an obstacle to the full understanding of the intention of the framers of the Treaty in which they occur.

Whether this obstacle has arisen from the want of clearness in the thoughts, or in an imperfect mastery over language in the provisions of the Treaty, a *logical interpretation* is equally needed; and for this purpose the application of the general rules, already laid down, must be first resorted to.

LXXX. With respect to difficulties of construction arising from both the foregoing sources of doubt, two general rules are applicable. (y)

1. That the contracting party, who might and ought to have expressed himself clearly and fully, must take the consequences of his carelessness, and cannot, *as a general rule*, introduce subsequent restrictions or extensions of his meaning. (z)

*2. That what is sufficiently declared must be taken to be true, and to have been the true intention of the party entering [^{*94}] into the engagement.

LXXXI. Under the second branch of logical interpretation, we have
obscurum est, quod scriptum duas pluresve res significat, ad hunc modum: Paterfamilias, quum filium heredem faceret, vasorum argenteorum centum pondo uxori suæ sic legavit: *heres meus uxori mææ vasorum argenteorum pondo centum, quæ volet, dato*. Post mortem ejus vasa magnifica et pretiose cælata petit a filio mater. Ille se, quæ ipse vellet debere dicit. Primum, si fieri poterit, demonstrandum est, non esse ambiguum scriptum, propterea quod omnes in consuetudine sermonis sic uti soleant eo verbo uno pluribusve in eam sententiam, in quam is, qui dicet, accipiendum esse demonstrabit. Deinde ex superiore et ex inferiore scripturâ docendum id, quod queratur, fieri perspicuum. Quare si ipsa separatim ex se verba considerentur, omnia, aut pleraque ambigua visum iri; quæ autem ex omni consideratâ scripturâ perspicua fiant, hæc ambigua non oportere existimari."—De Invent. l. ii. c. 35, 40.

(y) Vattel, ib. ss. 264–266.

(z) "*In stipulationibus quum queritur quid actum sit, verba contra stipulatorem interpretanda sunt.*"—Dig. xlv. i. 38, 18.

"*Veteribus placet, pactionem obscuram vel ambiguam venditori et qui locavit, nocere, in quorum fuit potestate legem pertius conscribere.*"—Dig. II. 14, 39; et vide ib. xviii. 1, 21; L. 17, 172; xviii. 1, 33.

Mr. Evans very justly observes, in a note to his edition of Pothier on Obligations, that "The rule of the English Law is directly the reverse, and the words of an engagement are to be construed most strongly against the person engaging." He adds that "These two opposite rules have probably both resulted from the same maxim, that *verba ambigua fortius accipiuntur contra proferentem*. By the Roman Law, the words of the stipulation were necessarily those of the person to whom the promise was made; the person promising, only assented to the question proposed by the person stipulating. There is nothing similar to this in the covenants and engagements used in England; but an indenture is the deed of both parties, and the words it contains are taken as the words of both, except as to those parts which are in their nature only applicable to one of them."—Vol. i. p. 58. See, too, Savigny, Obligationenrecht, II. 193–4–5, who expresses himself exactly to the same effect.

to consider cases of doubt, arising from the *impropriety* of the expression employed. That is to say, cases in which the expression does convey a meaning, and, abstractedly considered, an unambiguous meaning, but one which, when the circumstances are considered, evidently does not convey the meaning intended by the author or authors of the instrument in which it occurs.

In such cases is the word or the intention to prevail? It must be answered, that as the only function of the word is to express the intention, to sacrifice the latter to the former is to prefer the means to the end. The Roman jurists justly said of laws, "Non hoc est, verba earum tenere, sed vim ac protestatem;"(a) and not less justly of contracts, "In [*95] conventionibus *contrahentium voluntatem potius, quam verba spectari placuit."(b)

LXXXII. Cases of this character exhibit a much less varied form than those in which the doubt arises from the *uncertainty* of the expression.

The *impropriety* of the words to express the meaning arises, when the words convey *more* or *less* than the meaning of the person using them. In the former case the *impropriety* of the expression is rectified by a *narrowing* or *restrictive interpretation* (*interpretatio restrictiva*), in the latter by a *widening* or *extensive interpretation* (*interpretatio extensiva*).

LXXXIII. The object of both kinds of interpretation is identical, namely, to bring the expression in unison with the thought, and the necessity and justification of both is founded upon the hypothesis, that the thought is as demonstrably clear as the expression is evidently improper. Although, therefore, this kind of interpretation has been ranged under the class designated as *logical*, it manifestly is also of an *historical* character, necessitating a recurrence to the record of the facts which preceded or accompanied the formation of the Treaty; and here again we must have recourse to the general rules of interpretation which have been already laid down.

In the application, equally of the *restrictive* as of the *extensive* modes of *interpretation*, the most scrupulous caution is to be observed, lest the true bounds of the doctrine which we are considering be overpassed, and inference(c) or analogy(d) be substituted for interpretation, in which case it is clear, that the expression is not rectified by being brought into unison with the idea, but that a *new idea* is substituted by the interpreter in the place of that which was present to the mind of the framers of the Treaty.

(a) Dig. i. 3, 17.

"Verbum, ex legibus sic accipiendum est: tam ex legum sententiâ, quam ex verbis."—Dig. L. 16, 6.

"Sed etsi maximè verba legis hunc habeant intellectum, tamen mens legislatoris aliud vult."—Ib. xxvii. 1, 13, 2.

"Non oportere jus civile, calumniari neque verba captari, sed quâ mente quid diceretur, animadvertere convenire."—Ib. x. 4, 19.

(b) Dig. L. 16, 219.

(c) Savigny, R. R. i. s. 37.

(d) "*Analogiâ* præter legis argumentum *novi aliquid* inducimus, ideo, quod id quoque voluisse legislatorem probabile sit: quæ quidem res est et discriminis et cautionis plenissima."—Muhlenbruch Doctrina Pandect. l. 1, s. 64.

*LXXXIV. With respect to the mode of *interpretation*, which has been designated as *extensive*, Vattel, agreeing with Grotius [*96] and Puffendorf,(e) is of opinion that where the sufficient and only reason of a provision is undisputed and certain, such provision may be extended to cases to which the *same*(f) reason applies, although the provision be not comprised within the signification of the terms employed. This principle is sometimes called, an adhering to the spirit rather than the letter.(g) The Koran forbid wine to the Mahometans, and in so doing forbid all intoxicating liquors. It was a provision in a Treaty that a certain city should not be enclosed within walls: at the time when the Treaty was made, walls were the only species of fortifications in use; it would not be lawful to fortify that city by means of fosses and earth-works, because the spirit and intention of the Treaty was to prevent the fortification of the town. Sempronius willed in his last testament that if the child of his then pregnant wife should die, Curius should be his heir. The testator died, but his wife proved not to be pregnant. Are the heirs under an intestacy, or Curius, to possess the property? The latter, for it is manifest that the intention of the testator was that Curius should stand next to the testator's own child. These are the illustrations employed by Vattel and his great predecessors, in support of the position. One, it will be seen, borrowed from a *law*, one from a *convention*, one from an *unilateral act* or *testament*. Vattel, however, enforces with great earnestness the necessity of the utmost caution always attending the use of a mode of interpretation, which is not authorized by the terms of the instrument. It may only be resorted to in cases where there is no dispute with respect to the true and only reason of the provision; *and the cardinal rule, that the true sense of a promise is not only that which was in the mind of the promiser,(h) but also that [*97] which has been sufficiently declared, and which both the contracting parties must have reasonably understood, is never to be departed from. On the one hand, therefore, the instrument is not to be construed agreeably to the reason which one of the parties possibly *might* have had in his mind. On the other hand, it certainly ought to be construed agreeably to the reason upon which the parties clearly *did* proceed.

LXXXV. This rule of *extensive interpretation* excludes all the evasions and pretexts which have been resorted to for the purpose of evading stipulations. As a general maxim, it is true that good faith clings to the *spirit*, and fraud to the *letter* of the convention.(i)

(e) Grotius, l. ii. c. 16, 20. Puffendorf, l. v. c. 12, 18. Vattel, l. ii. c. 17, s. 291-2.

(f) If, Grotius observes, it only comes within a *like* reason, this will not show that they were included in his meaning.

(g) "Ergo hic status ducit ex eo quod scriptum est, id quod incertum est: quod quoniam ratiocinatione colligitur, *ratiocinativus* dicetur."—Quintilian, Inst. Orat. l. vii. c. 8.

(h) Vide ante, vol. i. p. 223.

(i) "Circumscriptio semper crimen, sub specie legis, involvit. Quod apparet in illa, legitimum est, quod latet, insidiosum."—Seneca, l. vi. Controv. 3.

"Contra legem facit, qui id facit, quod Lex prohibet: in fraudem verò legis, qui salvis verbis legis sententiam ejus circumvenit. Fraus enim legi fit ubi, quod fieri noluit, fieri autem non vetuit, id fit: et quod distat *ῥητον ἀπὸ διαβολας* (id est

When the Corinthians, being forbidden to *give* ships to the Athenians, *sold* them some, at a merely nominal price,—when the Queen of Egypt refused to pay tribute to the Rhodians for Pharos, because, though as an island, it was, under the convention, liable to such tribute, while the demand was being made she had joined it to the continent by a mole,—when these and similar frauds are attempted, the rule of *extensive interpretation* by which they are condemned, is the rule of acknowledged right.^(k)

[*98] *LXXXVI. There is another maxim of law relating to Private Contracts, which relates to the *extensive interpretation*, and the principle of which is applicable to International Covenants. Pothier says that,^(l) “ When the object of the agreement is universally to include everything of a given nature (*une universalité des choses*), the general description will comprise all particular articles, although they may not have been in the knowledge of the parties. For instance, an engagement which A. makes with B. to abandon his share in a succession for a certain sum. This agreement includes everything which makes part of the succession, whether known or not; the intention of A. and B. was to contract for the whole. Therefore it is decided that A. cannot object to the agreement, under pretence that a considerable property has been found to belong to the succession of which both parties had no knowledge.”

LXXXVII. *Restrictive* is the reverse of *Extensive Interpretation*, but founded upon the same principle of making the language correspond with the intention of the parties to the convention.

Grotius lays down three predicaments in which *Restrictive Interpretation* is necessary.

1. When, without a limitation of the literal meaning, an absurdity would follow.

2. When the only cause or reason which moved the will of the parties to the contract has ceased.

3. When the matter of the promise or engagement is defective.

LXXXVIII. It is a maxim of law that no one is supposed to intend what is absurd. A man bequeaths his house to one person, and his garden to another; it would be absurd to suppose that the latter had a garden bequeathed to him into which he could not enter. The absolute bequest of the house must therefore be *restricted*, and subjected to the condition of allowing a passage to the owner of the garden. Vattel [*99] applies *this rule to the conduct of States, and observes that when the strict meaning of a Treaty would lead to an unlawful

dictum a sententiâ,) hoc distat fraus ab eo, quod contra legem fit.”—Dig. i. 3, 29–30.

(k) The Roman lawyers classed the modes of evading a prohibitory law under four heads :—

By disguising or changing—

(1.) The *thing* which was the subject of the contract.—Dig. xiv. 6, 7, 3.

(2.) The *person*.—Ib. xxiv. 1, 5.

(3.) The *nature* of the contract.—Ib.

(4.) The *manner* of contracting.—Ib. xvi. 1, 8, 14.

(l) Pothier, (Evan's Transl.,) vol. I. p. 59.

consequence it must be *restricted*. The State which has promised to assist an ally in all his wars, ought not to assist him in a war which is manifestly unjust.

LXXXIX. Under the second class of cases mentioned by Grotius, must be discussed the important question arising from the maxim of Civilians, *conventio omnis intelligitur rebus sic stantibus*. When that state of things which was essential to, and the moving cause of the promise or engagement, has undergone a material change, or has ceased, the foundation of the promise or engagement is gone, and their obligation has ceased. This proposition rests upon the principle that the condition of *rebus sic stantibus* is tacitly annexed to every covenant. Grotius^(m) admits the soundness of this doctrine only in cases in which it is quite clear that the existing state of things was the sole cause of the contract.

Vattel illustrates the doctrine by several instances.⁽ⁿ⁾ An Elective Prince, having no children, promises an ally that he will endeavour to procure for him the right of succession; but a son is afterwards born to him. Who can doubt that the engagement is made void by this subsequent event? A sovereign, in time of peace, promises to send succour to an ally; before he can do so, war breaks out in his own dominions: he is not bound to fulfil a promise which would leave him defenceless.^(o) So, if a State be engaged to furnish another State with certain articles of commerce, and subsequent unforeseen circumstances render these articles of *paramount importance to the subjects of the engaging State, the delivery of the articles cannot be reasonably required. [*100] If, for instance, a State has promised to furnish corn to another state, and a dearth takes place, so that there be not corn enough for his own subjects,^(p) in this collision of duties, the preference must be given to the latter.^(q) Necessity, when real and bona fide, overrides the obligation of the promise.

Lord Stowell, sitting in the Prize Court observes that, a "clear necessity will be a sufficient justification of every thing that is done fairly, and with *good faith* under it."^(r) And again, "that the law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules, and whatever is *reasonable* and *just* in such cases is likewise *legal*. It is not to be considered as matter

(m) "Solet et hoc disputari, an promissa in se habeant tacitam conditionem, si res maneant quo sunt loco: quod negandum est, nisi apertissime pateat statum rerum præsentem in unica illa quam diximus ratione inclusum esse. Sic passim in historiis legimus legatos a suscepto itinere domum rediisse deserta legatione, quod res ita mutatas intelligerent, ut tota legationis materia aut causa cessaret."—L. ii. c. xvi. 25, 2.

(n) L. ii. c. xvii. 296.

(o) "Humana jura omnia ita esse comparata, ut non obligent in summa necessitate."—Grot. l. ii. c. 18-4, s. 6.

(p) On this principle Great Britain arbitrated between Sardinia and Tunis, 1843-4. With respect to events rendering the performance of a contract illegal in the case of individuals, owing to the breaking out of war between the nations to which they belong, see Abbott on Merchant Ships and Seamen, c. 13.

(q) Vide ante, p. 12, n. Vattel, l. ii. c. 12, s. 170.

(r) The Christiansberg, Rob. Adm. Rep. 6, 378.

of surprise, therefore if much instituted rule is not to be found on such subjects.”(s)

Treaties concluded against a particular State, in order to preserve the Balance of Power, must necessarily be subject to change, so far as the parties are concerned, when one of them endeavours to violate the principle by his own unlawful aggrandisement.

Vattel, in accordance with the natural feelings of honour and honesty, inculcates the utmost caution in the application of the rule of interpretation which has been under discussion. It is manifest that the State, like the Individual, which takes advantage of every change of affairs to disengage itself from the obligations of a solemn covenant, weakens the foundations of that good faith on which the peace of the world depends.

[*101] *XC. The caution which Vattel so strongly inculcates with respect to the rule, “*conventio omnis intelligitur rebus sic stantibus*,” was never more amply or more honourably illustrated, than in the conduct of Great Britain with respect to the Russo-Dutch Loan.

During the wars of the French Revolution, Great Britain took possession of the colonies belonging to the Dutch, not because she was at war with Holland, but to preserve them from France when France invaded Holland. When, in 1814, Holland was liberated from the dominion of France, Great Britain conceived herself bound in honour to restore to Holland these colonies. Therefore, on the 13th August, 1814, Great Britain concluded a Convention with the Netherlands, in the first article of which she engaged to restore to the Netherlands all the colonies which were possessed by Holland on the 1st of January, 1803, with the exception of the Cape of Good Hope, Demerara, Essequibo, and Berbice, which possessions were to be disposed of by a supplementary Convention. That supplementary Convention was contained in the first additional article to the Convention just referred to, namely, of the 13th August, 1814. By that additional article, Great Britain engaged, first, to pay 1,000,000*l.* to Sweden; secondly, to advance 2,000,000*l.* to be applied towards augmenting and improving the defences of the Low Countries; thirdly, to bear equally with Holland such further charges as might be agreed upon towards the final and satisfactory settlement of the Low Countries, in union with Holland, &c., not exceeding in the whole the sum of 3,000,000*l.*, to be defrayed by Great Britain. In consideration of these engagements, the Netherlands agreed to cede in full sovereignty to His Britannic Majesty the colonies of the Cape of Good Hope, Demerara, Essequibo, and Berbice. The manner in which this latter sum was to be expended, was determined by a subsequent Convention(t) signed on

(s) The Gratitude, *Ibid.* 3, 266.

(t) Hansard's Parl. Deb. vol. xc. N. S. vol. xci.—Debates on Cracow. See especially the speeches of Lord John Russell, Sir W. Molesworth, Sir R. Peel, and Mr. Stuart Wortley. See, too, the question again mooted in the House of Commons, by Lord Dudley Stuart, August 1, 1854, and the speech of Sir. W. Molesworth, which exhausts the subject.

55 Geo. III. c. 115, (28th June, 1815.)

2 & 3 Wm. IV. c. 81, (3rd August, 1832.)

Hertzlett's Treaties, vol. iv. p. 367, &c.

the 19th of May, *1815, between Great Britain, the King of the Netherlands, and Russia, by which Great Britain undertook the [*102] payment of part of a debt owed by Russia to Holland.

According to the terms of the Convention, "His Majesty the King of the Netherlands, being desirous, upon the final reunion of the Belgic provinces with Holland, to render to the Allied Powers who were parties to the Treaty concluded at Chaumont on the 1st March, 1814, a suitable return for the heavy expense incurred by them in delivering the said territories from the power of the enemy; and the said Powers, having, in consideration of arrangements made with each other, mutually agreed to waive their several pretensions under this head in favour of His Majesty the Emperor of all the Russias, His said Majesty the King of the Netherlands has thereupon resolved to proceed immediately to execute with His Imperial Majesty a Convention to the following effect, to which His Britannic Majesty agrees to be a party, in pursuance of engagements taken by His said Majesty with the King of the Netherlands, in a Convention signed at London on the 13th day of August, 1814."

In the second article, their Belgic and Britannic Majesties engaged to pay an annual interest of 5 per cent. on the said capitals, together with a sinking fund of 1 per cent. In the third and fourth articles it was agreed that these payments should be made through the agency of Russia, and that Russia should "continue as heretofore to be security to the creditors for the whole of the said loan, and shall be charged with the administration of the same, their Belgic and Britannic Majesties remaining liable to his Imperial Majesty, each for the punctual discharge of the respective proportions of the said charge."

*By the fifth article it was said to be "understood and agreed [*103] between the high contracting parties, that the said payments on the part of their Majesties the King of the Netherlands and the King of Great Britain, as aforesaid, shall cease and determine should the possession and sovereignty (which God forbid!) of the Belgic provinces at any time pass or be severed from the dominions of His Majesty the King of the Netherlands previous to the complete liquidation of the same. It is also understood and agreed between the high contracting parties, that the payments on the part of their Majesties the King of the Netherlands and the King of Great Britain, as aforesaid, shall not be interrupted in the event (which God forbid!) of a war breaking out between any of the three high contracting parties; the government of His Majesty the Emperor of all the Russias being actually bound to its creditors by a similar agreement."

In 1831, after the separation of Holland and Belgium, Great Britain having changed her mind, with respect to the advantage accruing to Europe from the union of these territories, was anxious to induce Russia to assent with her to their severance, and to the establishment of the new kingdom of Belgium. For this purpose, Great Britain entered into a new Treaty with Russia, whereby, though the event had happened which released Great Britain from the obligation of continuing to pay her portion of the loan, she nevertheless bound herself again to do so, by a new Convention entered into in 1831, in which it was said that :

"Their Majesties the King of the United Kingdom of Great Britain and Ireland and the Emperor of all the Russias, considering that the events which have occurred in the United Kingdom of the Netherlands, since the year 1830, have rendered it necessary that the Courts of Great Britain and Russia should examine the stipulations of their Convention of the 19th May, 1815, as well as of the Additional Article annexed thereto; considering that such examination has led the two high contracting parties to the *conclusion, that complete agreement does not [*104] exist between the letter and the spirit of that Convention, when regarded in connection with the circumstances which attended the separation that has taken place between the two principal divisions of the United Kingdom of the Netherlands; but that, on referring to the object of the above-mentioned Convention of the 19th May, 1815, it appears that that object was to afford to Great Britain a guarantee that Russia would on all questions concerning Belgium, identify her policy with that which the Court of London had deemed the best adapted for the maintenance of a just balance of power in Europe; and, on the other hand, to secure to Russia the payment of a portion of her old Dutch debt, in consideration of the general arrangements of the Congress of Vienna,^(u) to which she had given her adhesion—arrangements which remain in full force; their said Majesties being desirous, at the present moment, that the same principles should continue to govern their relations with each other, and that the special tie which the Convention of the 19th May, 1815, had formed between the two Courts, should be maintained, have, &c.

"ART. I.—In virtue of the considerations above specified, his Britannic Majesty engages to recommend to his parliament to enable him to undertake to continue, on his part, the payments stipulated in the Convention of the 19th May, 1815, according to the mode, and until the completion of the sum fixed for Great Britain in the said Convention.

"ART. II.—In virtue of the same considerations, his Majesty the Emperor of all the Russias engages, that if (which God forbid!) the arrangements agreed upon for the independence and the neutrality of Belgium, and to the maintenance of which the two high powers are equally bound, [*105] should be endangered by the course of events, he will not *contract any other engagement, without a previous agreement with His Britannic Majesty, and his formal assent."

In 1847, after the incorporation of the free city of Cracow into the Austrian dominions, Mr. Hume moved in the House of Commons the following resolutions:

"1. That this house, considering the faithful observance of the General Act of Congress, or Treaty of Vienna, of the 9th day of June, 1815, as the basis of the peace and welfare of Europe, views with alarm and indignation the incorporation of the free city of Cracow, and of its territory, into the empire of Austria, by virtue of a Convention entered into at Vienna, on the 6th day of November, 1846, by Russia, Prussia, and Austria, in manifest violation of the said Treaty.

"2. That it appears, by returns laid before Parliament, that there

(u) Not the Treaty of Vienna, with which, in the debate, it was sometimes confounded.

has already been paid from the British treasury towards the principal and for the interest of the debt, called Russo-Dutch loan, between the years 1816 and 1846, both inclusive, the sum of 40,493,750 florins, equal to 3,374,479*l.* sterling money; and that the liquidation of the principal and interest of the remaining part of the loan, as stipulated by the Act of 2 & 3 Will. 4, c. 81, will require further annual payments from the British Treasury until the year 1915, amounting to 47,006,250 florins, equal to 3,917,187*l.* sterling money, making then the aggregate payment of 7,291,666*l.* and the average, for each of the hundred years, of 72,916*l.*

"3. That the Convention of the 16th day of November, 1831, between His Majesty the King of Great Britain and Ireland and the Emperor of all the Russias, was made to explain the stipulations of the Treaty between Great Britain, Russia, and the Netherlands, signed at London on the 19th day of May, 1815, and included in the Treaty of Vienna; and, by that Convention, it was agreed by Great Britain 'to secure to Russia the payment of a portion of her old Dutch debt, in consideration of the general arrangements *of the Congress of Vienna, to which she had given her adhesion—arrangements which remain [*106] in full force.'

"4. That this house is, therefore, of opinion, that Russia having withdrawn that adhesion, and those arrangements being, through her act, no longer in force, the payments from this country, on account of that debt, should be henceforth suspended."(*x*)

The Government, however, with the support of the legislature, refused to assent to these resolutions, principally upon these grounds: 1. That the loan had been undertaken by Great Britain partly on account of the exertions made by Russia with the other great powers in liberating Belgium from France, and annexing it to Holland. 2. Partly because Great Britain had undertaken the loan in some measure as a set-off against the Dutch possessions of the Cape of Good Hope, Demerara, Essequibo, and Berbice, retained by her after the conclusion of the peace, 1814–15. 3. Because the convention of 1831 contemplated the continuance of the payment by Great Britain, even during a war with Russia. It was admitted, during the discussion, that the evidence of the intention of the contracting parties was to be derived from the contemporary instruments, (*y*) and from the main object, even against the letter of the Convention.

In August, 1854, the attempt of Mr. Hume was renewed by Lord Dudley Stuart. The motion for repudiating the loan was founded upon the averment that Russia had violated a main article of the Treaty of Vienna, with respect to the free navigation of rivers flowing through divers countries, (*z*) *by rendering the mouths of the Danube unnavigable; (*a*) and that therefore she was not entitled to fur- [*107]

(*x*) Hansard's Parl. Deb. vol. xc. p. 879.

(*y*) See Sir Robert Peel's remarks on the despatch of Lord Castlereagh, 13th February, 1815, as explanatory of the Convention.

(*z*) Vide ante, vol. i. p. 173. It may well be doubted whether the provisions of the Treaty of Vienna (which, by the way, did *not* include the Convention of the

(*a*) See next page.

ther payment of the loan. The motion, which was in substance the same as that of Mr. Hume, was, for the like reasons, and for the additional reason that Great Britain was, on account of being at war with Russia, bound, by a regard to national honour, to be more than ever jealous of affording the slightest ground for the accusation that she wished to repudiate her debts justly contracted with the power which was now her enemy.(b)

XCI. It is quite consistent with the maintenance of this faith, when the interpretation of a Treaty, with reference to a case not foreseen or provided for by it, has become necessary, to conduct that interpretation as nearly as possible in accordance with what the party would have done if the circumstance which has now happened had been foreseen. This is sometimes called the *argumentum a ratione legis amplâ*, and is founded on the rule of law: "*ubi eadem ratio ibi idem jus statuendum.*"

XCII. (c) When the apprehension of a particular event has been the reason of a particular provision of a Treaty, this provision is not to be restricted to cases in which such an event is improbable, but to be extended to all cases in which the event is possible. If a Treaty declare that no army or fleet shall be conducted to a certain place, it will not be allowable to conduct thither an army or a fleet, under pretence that no harm is intended by such a step; for the object of the provision was not only to prevent the actual occurrence of an evil, but to keep all danger, and all apprehension of danger, at a distance.

XCIII. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that [*108] the contracting parties proposed *to covenant, and not others which were not within the scope of their intention or contemplation.(d)

XCIV. When a case is expressed in a contract for the purpose of preventing any doubt which might otherwise arise as to whether the engagement resulting from the contract would extend to such case, the parties are not thereby understood to restrain the extent to which the engagement, in respect to other cases not so expressed, would legally reach.(e)

This subject has also been considered in a case before the Supreme Court of the United States of America, respecting the construction of the Treaty of peace with Great Britain. During the war, the State of Virginia made a law, that all persons indebted to British subjects might pay the amount into the loan-office, which should be a good discharge. By the Treaty of peace it was provided that "creditors of either side should meet with no lawful impediments for the recovery of their debts."

19th of May) could affect the Russian possession of the mouths of the Danube, acquired by the Treaty of Adrianople, 1829.

(a) Vide ante, vol. i. p. 177.

(b) Vide post, as to the effect of war upon the debts both of States and Subjects. Vide ante, chap. iii. as to such debts in time of peace.

(c) Vattel, l. ii. c. 37, s. 298.

(d) "*Iniquum est enim, perimi pacto id, de quo cogitatum non docetur.*"—Dig. ii. 15, 9.

Vide ante, vol. i. pp. 49-50.

(e) Vide ante, vol. i. p. 45.

"Quæ, dubitationis tollendæ causâ, contractibus inseruntur, jus commune non lædunt."—Dig. L. 17, 81.

The defendant had paid the money into the loan-office; but it was held that, in consequence of the Treaty of peace, he was liable to the plaintiff. Judge Chace, in giving his opinion to that effect, said: "In the construction of contracts, words are to be taken in their natural and obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense. The universality of the terms is equal to an express specification on the treaty, and indeed includes it. For it is fair and conclusive reasoning, that if any description of debtors, or class of cases, were intended to be excepted, it would have been specified. The indefinite and sweeping words made use of by the parties exclude the idea of any class of cases having been intended to be excepted, *and explode the doctrine of constructive discrimination." (f) [109]

XCV. Under the extensive and restrictive kinds of interpretation, Jurists have been in the habit of including a once celebrated distinction between things of a favourable and things of an odious nature.

(g) Barbeyrac rejected this distinction, on the ground that these assumed qualities cannot found any safe rules of interpretation. That the same characteristics may seem odious to one party and favourable to another, according to the dispositions of each, and the point of view from which they regard them. That they are incapable therefore of a certain definition; that it is admitted that the two qualities are often blended together in one and the same subject; and, above all, that without having recourse to this distinction, sound rules of interpretation may be always obtained.

(h) Vattel, however, adheres to the distinction, but thinks that, with

(f) Ware v. Hylton, 3 Dallas (American,) Reports.

See, too, Hamiltons v. Eaton, Martin (American,) Reports, 79.

Pothier (Evans's trans.,) vol. i. p. 39.

(g) See his note on Grot. l. ii. c. 16, 10, in which he repeats the opinion which he had already expressed in his commentary on Puffendorf, De Jure Nat. et. Gent. s. 12.

(h) "One of the sections of Vattel which is relied on, states this proposition, 'That whatever tends to change the present state of things, is also to be ranked in the class of odious things.' (B. ii. s. 305.)* Is it not most manifest, that this proposition is, or at least may be, in many cases, fundamentally wrong? If a people free themselves from a despotism, is it to be said, that the change of government is odious, and ought to be construed strictly? What, upon such a principle, is to become of the American Revolution, and of our State Governments, and State Constitutions? Suppose a well-ordered Government arises out of a state of disorder and anarchy, is such a Government to be considered odious? Another section (s. 508,) adds, 'Since odious things are those whose restrictions tends more certainly to equity than their extension, and since we ought to pursue that line which is most conformable to equity, when the will of the Legislature or of the contracting parties is not exactly known, we should, where there is a question of odious things, interpret the terms in the most limited sense. We may even, to a certain degree, adopt a figurative meaning, in order to aver the oppressive consequences of the proper and literal sense, or anything of an odious nature which it would involve.' Does not this section contain most lax and unsatisfactory ingredients for interpretation? Who is to decide whether it is most conformable to equity to extend or to restrict the sense? Who is to decide whether the provision is odious? According to this rule, the most opposite interpretations of the same words would be equally correct, according as the interpreter should deem it odious or salutary. Nay, the words are to be deserted, and a figurative sense adopted, whenever he deems it advisable, looking to the odious nature or conse-

[*110] respect to certain things, concerning which the *intention of the parties is not clear, equity gives in some cases an extensive in others a restrictive interpretation. This is unquestionably true, and is indeed the substance of what has been already stated. But the catalogue of things favourable, to which Vattel applies the extensive, and of things odious, to which he applies the restrictive interpretations, are of a very loose and disputable character; and the rules which he lays down appear to find their place with more propriety and accuracy under the other different heads which have been mentioned.

[*111]

*CHAPTER IX.

COLLISION OF TREATIES.

XCVI. It has been already remarked that it is not competent to a State to adopt customs or make Treaties which come into collision with Divine or Natural Law,^(a) or which affect the general International Law with respect to other States which are not parties to the Treaty.^(b) But a collision or opposition may happen between two human laws,^(c) two promises, or two Treaties; the fulfilment of both may be impossible, and in this case it is desirable to have recourse to some recognized rules for ascertaining to which the preference should be given.^(d) Grotius, borrowing from Cicero and Vattel, has here laid down various rules, which in such cases should be observed.

XCVII. 1. In all cases where a stipulation which is permissive, conflicts with one that commands, the former must yield to the latter. This doctrine that command outweighs permission, was derived by Grotius from Cicero, and is adopted by all jurists; nevertheless a universal command, according to Barbeyrac, gives way to a particular permission.

[*112] *2. A stipulation, which may be complied with at any time must yield to one which must be executed directly or not at all. This rule is manifestly reasonable;—by the adoption of it both engagements may possibly be satisfied,—whereas by a contrary rule only one can be satisfied.

3. A prohibitory stipulation must be preferred, as a general rule, over one which is imperative,—upon the principle that every prohibition is absolute in itself, whereas, every injunction is of necessity conditional, and supposes a power and an opportunity of doing what is enjoined.

quence of the common sense.”—Story on the Constit. of the United States, vol. i. pp. 291–2.

(a) Vol. i. p. 26, s. 34.

“Pacta, quæ turpem causam continent, non sunt observanda.”—Dig. ii. xiv. 27, 4.

(b) “Privatorum conventio juri publico non derogat.”—Dig. L. 17, 45. Vide ante, vol. i. p. 44, s. 52.

(c) Quintil. Instit. Orator. lib. vii. c. 7.

(d) Grot. l. ii. c. 16, 29. Vattel, l. ii. c. 17, ss. 311, 321. Rutherford, b. ii. c. 7, p. 430. (Ed. Baltimore, 1832.)

When this cannot be done without contravening a prohibitory stipulation, there is no opportunity, and therefore no moral possibility, of acting; but this remark is true only in cases where the prohibition is absolute and unconditional.

4. When two stipulations, equal in other respects, conflict with each other, the more particular one has precedence over that which is more general. This is the rule in the conflict of laws, founded upon the principle that the legislator, when he speaks particularly, is held to be more carefully to guard against accidental exceptions, and therefore more unwilling to admit of any, than when he speaks in general.

5. It is a rule, with respect to all prohibitions, that the prohibition which has a penalty attached to it is to be preferred to the one which has not, and that which has the greater penalty to that which has the lesser.

In the case of the *Ringende Jacob*, it was considered whether the freighting the ship to the enemy was or was not the lending prohibited in the Swedish Treaty. (October 21st, 1666.) Sir W. Scott said, "reference has been made to an ancient Treaty between England and Sweden, which forbids the subjects of either powers 'to sell or *lend* their ships for the use and advantage of the enemies of the other;' and as this prohibition is connected in the same article with the subject of contraband, it is argued, that the carrying of contraband articles in the present cargo, is such a lending as comes within the meaning of the Treaty; but *I cannot agree to that interpretation. To let a ship on freight to go to the ports of the enemy, cannot be termed [*113] lending, but in a very loose sense; and I apprehend the true meaning to have been, that they should not give up the use and management of their ships directly to the enemy, or put them under his absolute power and direction. It is, besides, observable, that there is no penalty annexed to this prohibition. I cannot think that such a service as this is will make the vessel subject to confiscation."(e)

6. A sound rule is often derived from the consideration of dates of Treaties. If there happen a collision between two affirmative Treaties concluded between the same contracting parties, the Treaty of more recent, is preferred over that of later date. In this case both covenants have been made by the same powers, and therefore the subsequent might derogate from the former act. On the other hand, if a collision happen between two Treaties concluded between two different contracting parties, the more ancient one must be executed, because it was not within the competence of the party promising, to act in derogation of his antecedent engagements to another.

7. If of two engagements, contracted with the same party, only one can be fulfilled, it is true, as a general rule, the promisee may choose which of the two shall be performed; and if his will cannot be discovered, the promisor must fulfil the more important engagement, as being that of which the promisee would presumedly require the fulfilment.

8. Vattel says, that when two duties stand in competition, that one which is the more considerable, the more praiseworthy and productive

of the greater utility, is entitled to the preference. Lord Bacon says, that "it is a point worthy to be observed generally of the rules of law, that when they encounter and cross one another, that it be understood which the law holds to be worthier and to be preferred; and it is in this [*114] particular very notable to consider that this being a *rule of some strictness and rigour, doth not, as it were, its office but in the absence of other rules, which are of some equity and humanity." (f)

XCVIII. It should be observed that the question as to the judicial proofs of the acts of a Foreign State is now regulated by statute. (g) The 14 & 15 Vict. c. 99, s. 7, enacts, "All proclamations, treaties, and other acts of State of any foreign State, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign State or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned, that is to say, if the document sought to be proved be a proclamation, treaty, or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial Court, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said Court, and such judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is a judge has no seal; but if any of the [*115] aforesaid authenticated copies shall purport *to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

XCIX. The effect of war, and of the subsequent restoration of peace upon the continuing force and validity of Treaties, contracted previously to the breaking out of the war, will be considered hereafter.

[*116] The reader will find in the note (h) a reference to some of *the principal cases decided in the British and American Courts of Law, involving the interpretation and construction of Treaties.

(f) Maxims of the Law, Regula III.

(g) As to former law, see *Richardson v. Anderson*, 1 Campbell, p. 65, n. (a)

(h) CASES FROM THE ENGLISH REPORTS.

Elphinstone v. Bedreechund, 1 Knapp's Privy Council Rep. p. 340. *Maltass v.*

PART THE SIXTH.

*CHAPTER I.

[*117]

RIGHTS OF SOVEREIGNS.

C. It was observed in an early part of this work,^(a) that there were certain subjects of International Law, which, though only to be accounted

Maltass, 1 Robertson's Ecc. Rep. p. 67. Lindo v. Rodney, Douglas' Rep. p. 340. Hotham v. East India Company, ib. p. 277. Chalmers' Collection of Opinions, ii. pp. 345-6. Marryat v. Wilson, 1 Bosanquet & Puller's Rep. pp. 436-9. Report of Sir Leoline Jenkins (December, 1668), on the Construction of the Treaty between the French and English, vol. ii. p. 735. The Diana, 5 Robinson's Adm. Rep. p. 60. In the same case, ib. p. 67. The Fama, ib. p. 106. The Zacheman, ib. p. 152. The Charlotte, ib. p. 305. The Eliza Ann, 1 Dodson's Adm. Rep. p. 244. The Molly, ib. p. 394. The Ringende Jacob, 1 Robinson's Adm. Rep. p. 89. Richardson v. Anderson, 1 Campbell, 65, n. (a)

CASES FROM AMERICAN REPORTS.

Foster v. Neilson, 2 Peters, p. 253. Gordon v. Kerr, 1 Washington's C. C. p. 322. Society v. New Haven, 8 Wheaton, p. 464. United States v. Percheman, 7 Peters, p. 51. The St. I. Indiano, 2 Gallison's, p. 268. Blight v. Rochester, 7 Wheaton, p. 535. Whitaker v. English, 1 Bay, p. 15. Hutchinson v. Brock, 11 Massachusetts, p. 119. The Pizarro, 2 Wheaton, p. 227. The Santissima Trinidad, 7 Wheaton, p. 283. Hylton v. Brown, 1 Washington's C. C. p. 343. Bolchos v. Three Negro Slaves, Bee's Admiralty, p. 74. British Consul v. Ship Mermaid, ib. 69. Henderson v. Poindexter, 12 Wheaton, p. 530. Garcia v. Lee, 12 Peters, p. 511. M'Nair v. Ragland, 1 Devereux's Equity, p. 516. Orser v. Hoag, 3 Hill, p. 79. Miller v. Gordon, 1 Taylor, p. 300. Wilson v. Smith, 5 Yerger, p. 379. Ware v. Highton, 3 Dallas, p. 199.

Hamyltons v. Eaton, Martin, p. 79, and see especially the following cases, as to the construction of the Treaties between Spain and England of 1762 and 1783, giving privileges to vessels to cut mahogany, and the construction of the proclamation and by-laws relative to the trade under them.—Graham v. Pennsylvania Ins. Co., 2 Washington's C. C. p. 113.

Under the second article of the Treaty with Great Britain of 1794, the precincts and jurisdiction of a port are not to be considered as extending three miles in every direction, by analogy to the jurisdiction of a country over that distance of sea upon its coasts, but they must be made out by further proof.—Jackson v. Porter, Paine, p. 457.

The fourteenth section of the Spanish Treaty of 1795, which prohibits citizens of Spain or of the United States from taking commissions to cruise against either of those countries, does not extend the prohibition to public ships of war.—The Santissima Trinidad, 7 Wheaton, p. 283.

No form of passport having been annexed to the seventeenth article of the Spanish Treaty of 1795, the immunity intended by that article never took effect.—The Amiable Isabella, 6 Wheaton, p. 1.

The United States, by their alliance with France, existing in 1780, were not considered as parties in the capitulation made by the Marquis de Brouillé with the inhabitants of Dominica. Miller v. The Resolution, Bee's Adm., p. 404.

Where individual rights vest under a Treaty, the meaning of the Treaty, in respect to them, is to be construed by the same rules as private contracts. Anderson v. Lewis, 1 Freeman's Chancery, p. 178.

When a Treaty makes no special provision for deciding questions of individual (a) See next page.

as such mediately and derivatively, required a separate consideration; and it was said that these subjects of International Law were the following individuals, who are said to represent a State:—

1. Sovereigns.
2. Ambassadors.

And another class of public officers, not clothed, accurately speaking, with a representative character, but who occupy a *quasi* diplomatic position—namely,

3. Consuls.

We have now to consider the International Status of Sovereigns with respect to themselves and their families.

[*118] CI. The Sovereign(*b*) represents in his person the collective power of the State. His person, as such representative, is the subject—by a custom, which to say the least, approaches the border of positive law—of certain international rights. The recognition of his title and claims as the *de jure* ruler of the nation, of which he is the *de facto* governor, and the principles of International Law applicable thereto, have been already considered.(*c*)

CII. The Sovereignty of the State may be vested in a single individual, as in a monarch, a stadtholder, or a president; or in more than one, as in the Consuls of ancient Rome, or of republican France at the beginning of this century; or in various persons exercising the powers of regency pending the minority of the Sovereign.(*d*)

The Roman Law expresses the rule of International Law upon this subject—"Magistratus municipales, cum unum magistratum administrant, etiam *unius hominis vicem* sustinent."(*e*)

CIII. Before we enter upon the discussion of the personal prerogatives incident to the Sovereign in a foreign country, it must be remem-

identity, they must be decided by the judicial tribunals of the country. Stockton v. Williams, Walker's Chancery, p. 120.

Savigny has a chapter on the Foreign Codes which contains specific enactments as to the Interpretation of Laws. R. R. i. s. 61. *Ausprüche der neueren Gesetzbücher über die Auslegung.*

(*a*) Vide ante, vol. i. p. 10.

(*b*) Vattel, l. iv. c. 7, s. 108; l. ii. c. 3, c. 4.

Grotius places the extritoriality of Ambassadors upon this ground:—"Ut qui sicut fictione quādam habentur *pro personis mittentium*, ita etiam fictione simili constituerentur quasi *extra-territorium*." L. ii. c. xviii. 4, 5.

Puffendorf, De Jure Nat. et Gent. l. viii. c. 4, 21.

Bynkershoek, De Foro Legatorum, c. 3. "Princeps in alterius Imperio quo jure censeatur, quod ad forum competens." C. 4. "Principis bona in alterius Imperio, an per arrestum forum tribuant." These two chapters contain the best dissertation on this subject.

Zouch, De Jure Feicali inter Gentes, p. ii. s. 2, q. 6. "Utrum Princeps in alium Principem in suo territorio imperium habet?"

Günther, ii. 473, *præsertim*, ss. 4, 5, 6. Martens, l. v. ss. 164–175. Klüber, ss. 48–50. Heffters, ss. 48, 58. Fælix, s. 209.

The subject of extritoriality is again discussed under the subsequent title of Ambassadors.

(*c*) Vide ante, ch. iv.

(*d*) "Einem wirklichen Mitregenten oder souveränen Reichsverweser gebühren mit Ausnahme der Titel gleiche Rechte wie dem eigentlichen Souverän selbst." Heffters, l, vi. s. 55.

(*e*) Dig. L. 1, 25.

bered that the honour and independence of nations are affected by the treatment of their Sovereign. (f)

*The Sovereign is entitled to International rights belonging to his public character, both while resident at home, and while com- [*119]
morant abroad.

At home he has a right—

1. To be addressed by other States according to his proper and accustomed title.

2. To be treated in all communications, unless established usage, or the positive stipulations of Treaty have made a distinction, in all respects on a footing of perfect equality with the rulers of other States.

Abroad the Sovereign is entitled to be treated by all public functionaries of another State, in all public communications, with respect.

If he be personally the subject of a libel on his character, or be defamed, he is entitled to the same redress in the municipal Courts of Justice in the country of the libeller, as any subject of that country. If he were shut out from such redress on the ground of his being a Foreigner, or upon any technical ground, he would have just ground of complaint, unless, indeed, satisfaction were extra-judicially afforded to him.

But he has no just ground of complaint, if the sentence, after a fair trial conducted according to the ordinary law of the country, be adverse to him.

These cases are rarely such as concern the individual character of the Sovereign; they are generally such as concern the collective character of the State, as represented by the Sovereign.

The cases of persons proceeded against for libelling the Emperors Paul and Buonaparte, have been already considered as falling under the latter predicament. (g)

CIV. The Sovereign who travels through, or sojourns *temporarily for whatever cause (h) in a foreign state, is entitled to an [*120]
immunity from the civil jurisdiction therein. Even the private individual under these circumstances, much more the Sovereign, does not become "civis," or even "incola," but remains "advena." (i)

It is not worth while to enter into the discussion whether this immunity be the result of natural law or of established custom.

It is only in more modern times that this extritoriality has become, as it may now be considered, a settled rule of International Law.

A certain amount of jurisdiction (k) over the persons composing the

(f) "Die Unabhängigkeit des Staates kommt auch der Person seiner Repräsentanten zu: dem Regenten." Klüber, s. 48.

Zouch, p. i. s. v. 1, speaking of "*Delicta inter eos quibuscum Pax est*," says, "In his delictis primum est cum status læditur vel personis injuria offertur;" e. g., when the Athenians defiled the statues of Philip.

(g) Vide ante, vol. i. 415-17.

(h) Bynk. c. 3, suggests four:—

1. Ut res suas ipse agat.

2. Ut litem abortam ipse transactione componat.

3. Ut discat ex rationibus alieni imperii quod ad suum transferat.

4. Solius animi et oblectationis gratiâ.

(i) Mary Queen of Scots, Heffters, 106, n. 4.

(k) "Man gestattet ihm daselbst der civil gerichtbarkeit über seine Gefolge." Klüber, s. 50.

suite of sovereigns seems to be a corollary from this proposition. This jurisdiction is limited in most countries to matters of a civil character.

Martens, following De Real, qualifies the generality of the proposition by these conditions:—

1. That the Sovereign has not entered the foreign State clandestinely.
2. That he be an actually reigning Sovereign, or recognised as such by the foreign State.
3. That he have not submitted himself to the jurisdiction, by entering into the military service of the State, or by some *equivalent act [*121] of implied submission to its authority. These two last exceptions appear to be well founded; in their absence the rule “*par in parem non habet potestatem*”^(l) prevails, and one Sovereign remains exempt from the civil jurisdiction of another.

CV. With respect to criminal jurisdiction, the foreign Sovereign, as a general proposition, is exempt from it. Extreme cases may be put which would make the rule inapplicable. If, indeed, he should abuse the hospitality of the kingdom,^(m) he may be ordered, like a delinquent ambassador, to depart from it without delay.

If he should contrive or perpetrate any offence against the welfare of the country in which he is a guest, International Law would warrant the authorities of that country in preventing the commission of the offence, by placing him under necessary restraint, and in subsequently demanding satisfaction for the injury, at the hands of the country of this delinquent representative.

We may go a step further and say, that his acts of violence may be met by violence, and that if he perish in consequence of the resistance opposed to his unlawful conduct, no maxim of International Jurisprudence is violated.

CVI. But may the delinquent Sovereign, under any circumstances, [*122] be rendered amenable to the criminal jurisdiction of *a Foreign Country? It is difficult in a treatise on law to answer a question, which is founded upon the supposition, that the representatives of the majesty of the law are the criminals to be tried by the law.

“*Fac, principem homicidia et rapinas perpetrare, irruere in quosvis homines, non suos tantum,*” &c. Bynk. c. 3.

“*En vertu de cette exterritorialité on accorde aussi à des monarques étrangers la jurisdiction [civile au moins]* sur les gens de leur suite; mais on ne peut leur attribuer le droit d'exercer pendant leur séjour tous les différens droits de souveraineté qui produiraient leurs effets sur l'état ou ils se trouvent.*” Martens, l. 5, s. 172.

(2) Maxim cited by the defenders of Mary Queen of Scots.—Camden's Elizabeth, (ed. 1688,) b. 3, A. D. 1586, p. 370. See, too, Zouch, De Jud. inter Gentes, p. 2, s. 2, qu. 6.

(m) “*Quare ut extremum est in legato ut jubeatur Imperio excedere, sic et in Principe statuerem, si jus hospitii violet. Sed nec sine cautionibus ea res transigenda est. Quid si enim more latronis in vitam, in bona, in pudicitiam cujusque irruat, nec secus atque hostis captâ grassetur in urbe. Poterit utique detineri, forte et occludi, quamvis per turbam malim, quam constituto judicio. . . . Si Princeps in alieno Imperio manu rem agat, vel per se, vel per comites, quin manu repelli possit, non puto dubitandum. Si vero quid machinetur adversus Principem hospitem, ejusve Imperium, si aliud commune delictum perpetret, satis, puto, fiet rationi et Juri Gentium, si quod hic Jus Gentium est, si jubeatur finibus Imperii excedere, nec amplius turbare rempublicam nostram.*”—Bynk. c. 3.

* The bracketed words are inserted by the editor, Pinheiro Ferreira.

If, however, the question must receive a categorical answer, the answer must be in the negative.(n)

The historical precedents which might appear to countenance a contrary opinion are valueless. "Nihil igitur in hoc argumento proficies rebus similiter a gentibus judicatis," is the just observation of Bynkershoek.(o)

CVII. It is obvious moreover,(p) that this class of cases is happily so rare, and the instances cited are so exceptional in their nature, both from their own circumstances and from the periods of history in which they happened, that International Law cannot rely upon them as exponents of usage in this arduous matter, but must guide the inquirer by the reason of the thing applied to the exigency of each particular occurrence.

International Law, like the Civil Law, must pass by, without attempting to bring under exact rules, anomalies which a sudden emergency may create, or to provide remedies beforehand for all imaginable contingencies.(q)

The excellent sense of Bynkershoek appears in these, among other concluding remarks upon this subject, "Non adeo frequentes sunt ipsorum, qui imperant, Principum in alienis Imperiis peregrinationes, minus frequentia crimina vel debita, quæ huic disputationi causam præbere possint, et, quicquid sit, ob personæ sanctitatem, eo semper tempore *utimur, ne ob minima quæque magnum exemplum statuamus."(r) [*123]

CVIII. The privilege of extritoriality is extended to the moveable effects which foreign Sovereigns carry with them.

The common usage of Europe exempts such effects from the payment of custom duties and the visitation of custom-house officers. The immunity is further extended by general Comity to goods destined for a Foreign Sovereign or his family in their transit through foreign countries; though this privilege has sometimes, as in the treaty of Peace between Russia and Saxony in 1745,(s) been the subject of an express stipulation.

As to other private property of a foreign Sovereign, both moveable and immoveable, it is, according to very high authorities on International Law, liable to arrest, adjudication, and sequestration by the municipal tribunals, and to the taxes and imposts of the local government.(t)

(n) Bynkershoek, referring himself for a solution of the difficulties growing out of this subject to "ratio" and "usus" (as the legitimate interpreters of International Law,) arrives at this conclusion:—"Quin fere eo deveniendum est ut negandum videatur, hanc rem Jure Gentium definitam esse, vel definiri posse." C. 3. Heffters, B. i. s. 102.

(o) Bynkershoek, c. 3.

(p) See next chapter, on Embassies.

(q) "Jura constitui oportet, ut dixit Theophrastus, in his quæ ἐπὶ τῷ πλείστον accidunt, non quæ ἐκ παραλόγου."—Dig. i. 3, 3.

"Τὸ γὰρ ἀναξ ἢ δις ut ait Theophrastus, παραβαίνουσιν οἱ νομοθέται."—Ib. 6.

(r) Bynkershoek, c. 3.

(s) Vide Art. 10.

(t) Bynkershoek, who insists strongly upon the liability of the Sovereign's private property to arrest, in the same manner as the property of any private person, would allow this exception. "Cavendum autem est, ne res ad injuriam vergat, nec quod inter privatos summum jus est, ex iniquis forte Pragmaticorum Decretis, id summâ injuriâ ad Principes porrigamus. Ajunt illi, vel rem minimam arresto

"Usu gentium invaluit," says Bynkershoek, "ut bona, quæ Princeps in alterius ditione sibi comparavit, sive hæreditatis, vel quo alio titulo acquisivit, perinde habeantur, ac bona privatorum, nec minus, quam hæc, subjiciantur oneribus et tributis." And, speaking of a difference of opinion on the point, he adds his approbation of Hilliger's Commentary on Donellus^(u) as follows: "Subditum vocat (principem) ratione fori, et executionis, quam judex forte decrevit in rem sibi subjectam, sive mobilem, sive immobilem, sive pecuniam, ex *quâcunque tandem [*124] causâ debeatur; utique, si me sequaris, sic ea interpretor."^(x)

CIX. Bynkershoek, and Martens,^(y) who adopts his view, draw no distinction between the moveable and immoveable private property of the foreign Sovereign; and, as far as the reason of the thing and the sentences of the Dutch tribunals are concerned, their opinion seems well founded.

It must be admitted, however, that the Comity at least of various nations has adopted this distinction, and, moreover, that it would be placed, with the sanction of eminent jurists, among the rules of positive law.

Not many years before Bynkershoek wrote his treatise, "De Foro Legatorum," the King of Prussia was cited into a Dutch Court as a defendant in the matter of the succession to the Principality of Orange.

He appeared and contested the suit,^(z) and appealed (A. D. 1716) to the Supreme Court of the Senate, before which he seems neither to have prosecuted nor abandoned his appeal, and yet eventually to have been successful in causing the sentence of the Court below to be reversed (A. D. 1719.) Probably, in this case the property was of both a moveable and immoveable description.

[*125] ^{*The practice of the English Courts, both of Equity and} Common Law, has been in favour of the privileged exemption of Sovereigns in all matters of private contract.

In 1844 the Duke of Brunswick filed a bill against the King of

detentam, sufficere ad subjectionem fori. Largiamur inter privatos, sic enim obtinuit, sed an ita Principis equus, per alterius ditionem transiens, poterit includi, ut causam præbeat foro? Si me auctorem sequaris, non poterit, nec quicquam magis erit contra præsumptam, si non testatam mentem Gentium."—C. iv.

(u) Hilliger ad Donell. l. xvii. c. 17, lit. A.

(x) Bynkershoek, c. 4.

(y) Martens, l. v. s. 173, quite to the same effect.

Bynkershoek overthrows Huber's opinion to the contrary.—De Jure Civ. l. 3, s. 2, c. 2, n. 21, ad tit. De in Jus Vocandi.

The cases cited by Huber and others, Bynkershoek refers to the comity and humanity of princes exercised on particular occasions.

Klüber, s. 40, confines the liability to immoveable property.

Heffters seems to be of the same opinion; and Huber has been already mentioned.

(z) He was much offended. Bynkershoek says (c. 4,) "Clausulâ edicti, per *campam*, ut fit, populo significata," and which, he gravely says, might as well be omitted when the prince has an ambassador who will receive service of the citation.

"Citation au son du *tambour*," Martens says, l. v. s. 173, n. (a); but no doubt Bynkershoek's version is correct.

Grotius, l. ii. c. xviii. 10.—"Nec metuendum est quod quidem putant, ne si id juris sit nemo inveniat qui cum legato contrahere velit. Nam et regibus qui cogi nequeunt non desunt creditores."

Hanover, and the Master of the Rolls held^(a) that his Majesty was exempt from the jurisdiction of the Courts in this country for any acts done by him as King of Hanover, or in his character of sovereign prince; but that, being a subject of Her Majesty Queen Victoria, he was liable to be sued in the Courts of this country in respect of any acts and transactions done by him, or in which he might have been engaged *as such subject*; and that in respect of any act done by him out of this realm, or any act, as to which it might be doubtful, whether it ought to be attributed to the character of sovereign prince, or to the character of subject, the same ought to be presumed to be attributable rather to the character of sovereign prince than to the character of subject. And it was also held by the Rolls Court, that in a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to show that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject.

And in a recent case in the English Court of Queen's Bench,^(b) it has been held that no English Court has jurisdiction to entertain an action against a foreign Sovereign for anything done, or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and, therefore, in an action entered in the Lord Mayor's Court against the Queen of Portugal "as reigning Sovereign and supreme head of the nation of Portugal," to recover a debt alleged to be due from the Portuguese Government, and in which a foreign attachment had issued, according to the *custom of the City of [*126] London, the Court made absolute a rule for a prohibition to restrain proceedings in the action and in the attachment. And the same principle was applied where a case was entered in the Lord Mayor's Court against the Queen of Spain, not expressly as reigning Sovereign and head of the Spanish nation, but where it appeared by affidavit that the plaintiff's sole cause of action arose upon a Spanish Government bond, purporting to have been issued under a decree of the Cortes sanctioned by the Regent of Spain, in the name of the Queen, then a minor.

In 1828, the French Court, the *Tribunal Première Instance* (1re *Chambre*), upheld the principles which have been stated, in two instances; one, an action brought by a French firm against the Spanish Government;^(c) another, in which an action was brought by a French company against the Republic of Haïti.^(d) In both cases judgment was given upon the same principle of International Law, namely, the *independence of Foreign Sovereigns*.

In the first case, the President Moreau delivered the following judgment:—

(a) Duke of Brunswick v. King of Hanover, Law Journal, vol. xiii. p. 107.

(b) De Haber v. Queen of Portugal, *ib.* vol. xx. p. 488. Wadsworth v. Queen of Spain, *ib.* May 28, 1851.

(c) *Affaire de la maison Balguerie, de Bordeaux, contre le Gouvernement espagnol* (voir la Gazette des Tribunaux des 19 et 26 Avril.)

(d) *Affaire de MM. Ternaux, Gandolphe, et Compagnie, contre la République d'Haïti* (voir la Gazette des Tribunaux du 26 Avril.)

“ Attendu que le droit de juridiction est une émanation de la souveraineté.

“ Attendu que l’art. 14 du Code civil ne peut être appliqué à un souverain étranger, d’abord parce qu’il ne dispose que pour les obligations contractées envers un Français par un individu étranger, et encore parce qu’on ne pourrait l’étendre aux souverains étrangers sans porter atteinte au droit qu’a tout gouvernement indépendant d’être seul juge de ses actes.

“ Attendu, en fait, que l’opposition formée par la maison Balguerie entre les mains d’Aguado, a pour cause l’exécution d’un traité passé [*127] entre S. M. catholique et cette *maison pour l’affrètement d’un certain nombre de navires destinés à transporter les troupes du gouvernement espagnol.

“ Qu’un pareil traité est évidemment un acte d’administration publique et ne peut, sous aucun rapport, être considéré comme un contrat privé.

“ Attendu, d’un autre côté, que les deniers sur lesquels l’opposition a été formée, sont des deniers publics destinés au paiement de l’emprunt royal espagnol, at qui ne pourraient être saisis sans entraver la marche de ce gouvernement.

“ Qu’admettre une personne privée à saisir en France les fonds d’un gouvernement étranger, serait violer les principes sacrés du droit des nations, et s’exposer ainsi à des représailles funestes.

“ Attendu, enfin, que les jugemens des Tribunaux français étant sans autorité hors du royaume, le gouvernement espagnol ne pourrait pas être forcé de s’y soumettre, et par conséquent de reconnaître la validité du paiement qui serait fait par Aguado.

“ D’où il suit que le Tribunal est incompétent.

“ Fait main levée de l’opposition, etc.”(e)

On the 16th April, 1847, one of the French Courts, the *Tribunal Civil de la Seine*, pronounced a very important judgment on the same subject.

A M. Solon brought an action against Mahemet-Ali, Viceroy of Egypt, for 100,000 francs, alleged to be due to him for his services in founding and superintending a school at Cairo. Mahemet-Ali was very ably defended by M. Odilon Barrot, principally upon the ground that a Foreign Government could not, according to the principles of International Law, be sued in an action of this description. The Tribunal [*128] *decided in conformity with this principle, and delivered the following judgment : (g)

“ Attendu que selon les principes du droit des gens, les Tribunaux français n’ont pas juridiction sur les gouvernemens étrangers, à moins qu’il ne s’agisse d’une action à l’occasion d’un immeuble possédé par eux en France comme particulier, ce qui emporte attribution territoriale et exécution.

(e) M. le Président Jarry a prononcé dans l’affaire *Ternaux-Gandolphe* un jugement semblable et motivé aussi sur l’indépendance des souverainetés.—*Gazette des Tribunaux* (3 Mai, 1828.)

(g) *Gazette des Tribunaux* du 17 Avril, 1847.

“Attendu qu'en matière de déclinatoire le juge doit avant tout consulter les termes de la demande.

“Attendu que l'action de Solon est une action personnelle qu'il motive sur un prétendu engagement, dont la rupture lui aurait causé un préjudice.

“Attendu que toutes les expressions de la demande lui donnent le caractère personnel et révèlent qu'elle est dirigée contre le gouvernement égyptien, et non contre un particulier.

“Attendu que pour apprécier cette demande, il ne faudrait pas examiner un acte particulier ayant pour cause un intérêt privé, mais un acte administratif et gouvernemental, intervenu entre un gouvernement et un fonctionnaire, auquel il a été conféré un emploi et une mission dont le demandeur a dû peser les conséquences; qu'il serait en outre nécessaire de rechercher les causes de la rupture qui motive l'action; que de pareilles appréciations ne sauraient appartenir à la juridiction française.

“Attendu que la demande ne tend pas seulement à faire valider des saisies-arrests pratiquées sur des marchandises appartenant soit au gouvernement égyptien, soit à Méhémet-Ali personnellement, mais d'abord et avant tout, préjudiciellement, à obtenir contre ce gouvernement la somme de 100,000 francs de dommages-intérêts.

“Reçoit S. A. Méhémet-Ali opposant au jugement rendu par défaut, le 25 août 1846, et faisant droit, déclare ledit jugement non avenu.

*“Se déclare incompétent sur la demande introduite par M. Solon, et le condamne aux dépens.” [129]

CX. If a dispute arise between two Sovereigns as to the ownership of private property, it is said (*h*) that the dispute cannot be decided in the municipal tribunal of the State over which either Sovereign presides; and that arrests or executions made by the decrees of such Courts would be, in fact, Reprisals, and not civil proceedings. This observation can hardly, however, apply to a case where the property is locally situated in the jurisdiction of either State. In that case, however, much must depend upon the mode in which the Judges who try the question are appointed; their entire independence, as in England, of the Crown would be a very material circumstance. Much also might depend upon the mode of conducting the trial, with respect to there being a full opportunity of stating the case, of choosing the advocate, with respect to the latitude allowed to him in the use of every argument considered by him necessary for his client, the adherence to the rules of evidence which are common to all civilized nations, the permission to produce all witnesses deemed necessary by him; if due regard were paid to all these requirements of justice, it would be difficult to deny the jurisdiction of the State over property situated within its confines, although it might appertain to a foreign Sovereign.

The decision of the tribunal of a third country upon the property in dispute between two Sovereigns, if the jurisdiction of the tribunal was properly founded (*forum rei sitæ, hereditatis arresti*), is held to be binding upon both litigants.

CXI. Nations may, of course, invoke the arbitration of a third coun-

(*h*) Martens, l. v. s. 173.

try, or may voluntarily submit their claims to the decisions of its tribunals. Spain and Portugal, as we know from the *Advocationes Hispanicæ* of Albericus Gentilis,⁽ⁱ⁾ submitted to the decisions of International Law pronounced upon their captures in the Admiralty Courts of England.

[*130] *Whether and how far the armies of a nation may be employed in vindicating the private rights of their Sovereign is a consideration of Public and Constitutional rather than of International Law; but it is quite in accordance with the principles of that law that the national armies should be employed for such an object.^(k)

CXII. The same remark is applicable to the case of injuries affecting the family of the Sovereign. "*Le droit de gens*," Martens observes,^(l) "*n'est pas violé lorsqu'un souverain embrasse la juste cause des membres de sa famille, dans des cas où il serait en droit de protéger le moindre de ses sujets, ou de prêter le secours sollicité par un prince étranger.*"

The various domestic ties which, in the course of centuries, have bound together the reigning houses of Europe, have in former times given to them the appearance of a common family, from which all the kings of Europe were descended. The French Revolution, and the events subsequent to it, have greatly effaced this appearance.^(m) The various customs which form a Code of Regal Comity, the notifications of accessions, births, marriages, deaths; the interchange of presents and congratulatory messages; the reception of foreign powers, the compliments paid to them on their arrival and departure, and on their travel through the country, do not seem to deserve any formal commentary in this work.

[*131] "On sent," says Martens, who touches lightly upon them, *"*que tout dépend ici des circonstances, et qu'il n'est pas question de droit parfait*."⁽ⁿ⁾

CXII. The personal rights incident to the Sovereign cease by his civil as well as his natural death.

If the Sovereign have abdicated^(o) or been lawfully deposed, and his abdication or deposition be recognized by other States, there is no doubt that any privileges accorded to him during his residence in foreign countries, depend entirely upon the course which the authorities in those countries deem it expedient to adopt. His legal title to international rights and favours has ceased. This position is not impugned by the case

(i) Vide ante, vol. i. *Introd.* xxvi. p. 195.

(k) Martens, l. v. ss. 173-4.

(l) *Ib.* s. 174. He refers, in a note, to the instances of Caroline Matilda in Denmark; Frederica Sophia in Holland; Marie Antoinette in France.

Flassan, *Hist. de la Dipl. Franç.* i. 378; ii. 286. Peace of Ryswick, art. 8, may be consulted for some, among many instances of the private quarrels of sovereigns supported by their subjects.

(m) "*Les liens de parenté ou d'alliance de famille entre les Cours ne donnent aucun rang à leurs employés diplomatiques. Il en est de même des alliances politiques.*" XVII. *Règlement sur le Rang entre les Agens diplomatiques* (19 Mars, 1815, art. vi.), *Acte du Congrès de Vienne*, signé le 9 Juin, 1815. Martens, *Rec. de Tr.* vol. x. p. 379.

(n) Martens, l. v. s. 171.

"*Europäische Völkersitte aber nicht Rechtspflichte*," Klüber justly remarks, s. 49.

(o) Heffters, s. 57.

See the formal instrument of abdication of the Empire of Brazil by Don Pedro, De Garden, *Traité de Dipl.* iii. 213-18.

usually cited of Christina, the ex-Queen of Sweden. (*p*) She lived many years after her abdication, and was not only allowed royal honours, but while resident in France put to death with impunity (1657) her chamberlain Monaldeschi: "Quod factum," Bynkershoek says, "Galli quamvis indignabundi, impunè transmiserunt ex impotentia muliebri, dicet alter, alter vero ex Jure Gentium ut optimum maximumque est." (*q*) It is clear, however, that Christina was justiciable for this murder before the French tribunals, unless, perhaps, the French authorities had debarred themselves by their previous acknowledgment of her title to the International Rights of a Sovereign. In any case, her instant dismissal from the kingdom was the very slightest vindication of the offended law which France should have exacted. (*r*)

*Mary Queen of Scots, at the time of her pretended trial in England, had been *de facto* twenty years dispossessed of her [*132] crown; her son had been acknowledged as King of Scotland by all Europe; she was styled, in her indictment, "Mary, daughter and heir of James V., late King of Scots; otherwise called Mary Queen of Scots, Dowager of France:" and if her trial and execution were only impugnable upon the ground of the violation of her rights as a Sovereign, it would be difficult to pronounce these acts a violation of strict International Law. The atrocious guilt of her murder rests upon other grounds, chiefly no doubt upon her forcible detention in England, "in violation" (as Mr. Hallam admits) "of all natural, public, and municipal law."

CXIII. (*a*) It is important, however, to remark, that if a foreign sovereign become a suitor or a plaintiff in the Courts of another country, he brings with him no privileges which can vary the practice or displace the law applying to other suitors in those Courts; and, therefore, both the Court of Chancery and the House of Lords decided that the King of Spain, though suing as a sovereign prince, and in his political capacity, in an English Court of Equity, was under an obligation to answer upon oath to a cross-bill filed against him by the defendants to his suit; (*s*) and the same doctrine had before been laid down with reference to a Republican Government, in the case of the Columbian Government v. Rothschild, in which the plaintiffs were described as the "Columbian Government," and their counsel being desired to show who they were, and not being able to do so, the demurrer to the bill was allowed, on the principle that the plaintiff must describe himself, so that the defendant might come against him by a bill or a cross-bill. (*t*) And in the case of Rothschild v. Queen of Portugal, the Court of Exchequer *held that Her Most Faithful Majesty, being a voluntary suitor in a Court of [*133]

(*p*) De Martens, Causes Cél. ii.

(*q*) De Foro Leg. c. 3.

(*r*) Mr. Hallam says, "I should be rather surprised to hear any one assert that the Parliament of Paris was incompetent to try Christina for the murder of Monaldeschi" (Constit. Hist. chap. iii.); though he offers a stouter defence for Elizabeth than almost any other historian.

See Strype's Annals of the Church, vol. iii. part 1, book ii. pp. 528—537, as to the case of Mary Queen of Scots. The opinion of the Common Lawyers as to the title. The Civilians as to the Law of Nations.

(*s*) King of Spain v. Hullett and Widder, 1 Clarke & Finnelly, 348, (A. D. 1833.) S. C. in the Court below, 1 Dow. & Clarke, 160.

(*t*) 1 Simon's Rep. 94.

English Law, became subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity; and was, therefore, compellable to answer to a bill filed against her by persons who were the defendants in an action which she had brought against them, but the plaintiffs in the bill filed against her in the Court of Exchequer.^(u) In the case of the Emperor of Brazil v. Robinson and Others, the Court of Queen's Bench decided that the Emperor, having engaged in a commercial transaction, and bringing an action thereupon in the Courts of this country, and being resident out of the jurisdiction, was not exempted from that necessity of finding security for costs, to which any other person bringing such an action would be subject;^(x) and they held this decision to be consistent with the principle of a former decision in which Lord Ellenborough had decided that such a privilege of exemption did attach to an ambassador, who was in this country merely in his political capacity, and concerning whom there was no reason to suppose that he was desirous of leaving the country,^(y) or going out of the jurisdiction.

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*CHAPTER II.

EMBASSY—ANTIQUITY AND UNIVERSALITY OF ITS RIGHTS.

CXIV. WE now approach the subject of Embassies,^(a) a part of International Jurisprudence which has taken deep root in the practice of nations, and is therefore capable of precise treatment and clear exposition.

The principal rights and duties incident to Embassies have been recognized by all communities at all removed from the condition of savages.

[*135] *The whole subject may be conveniently discussed under the following general heads:

1. Who may send and receive Ambassadors?

(u) 3 Young & Collyer's Rep. 594, (A. D. 1839.)

(x) Emperor of Brazil v. Robinson and Others, 5 Dowling's Rep. of Practice Cases, 522, (A. D. 1837.)

(y) The Duke de Montellano v. Christin, 5 Maule & Selwyn's Rep. 503, (A. D. 1816.)

(a) The principal authorities relied on for this subject are—

Albericus Gentilis, *De Legationibus*, libri tres. The first good work on the subject. Grotius, l. ii. c. xviii. *De Legationem Jure*.

Zouch, *De Judio inter Gentes*, pars i. iv. *De quæstionibus debiti inter eos quibuscum par est—solutio quæstionis veteris et novæ, sive de legati delinquentis jure competente Dissertatio*. Oxon: 1657.

Wicquefort, *De Legato*, translated by Barbeyrac, 1681. *L'Ambassadeur et ses Fonctions*, 1746, last ed.

Bynkershoek, *De Foro competente Legatorum*. This treatise, though not without some characteristic defects of the author, is by far the best that has been written on the subject. Qu. Juris Pub. l. ii. c. iii.-ix. Vattel, l. iv. ch. 5, 6, 7, 8, & 9. Martens, l. vii. ss. 185-250. Klüber, ss. 166-230, c. iii. Heffters, B. iii. ss. 193-230. Miruss, *Das Europäische Gesandtschaftsrecht*, Leipzig, 1847. Ward's Law of Nations, vol. ii. c. xvii. Wheaton, Hist., pp. 48, 51, 95, 232-256, 496. Fælix, *Droit Int. Pr.*, l. ii. t. ii. ch. ii. s. 4. Wildman, l. c. 3.

2. Is their reception obligatory?
3. Their Right of Inviolability.
4. Their Privileges of Exterritoriality.
5. May the Ambassador by any, and what, misconduct forfeit his Rights and Privileges?
6. When the functions of the Ambassador legally cease.

CXV. Every nation, so far *sui juris* as to be capable of negotiating in its own name with another nation, has the right of sending an Embassy (*droit actif—actives Gesandtschaftsrecht*).

CXVI. Therefore, not only independent States have this, among other *jura majestatis*, but dependent States, who have not an entire Sovereignty, may possess this right, if the nature of their connection with the protecting State allows them the liberty of conducting their foreign relations with other States. (b)

By the sixteenth article of the Treaty of Kainardgi, (c) concluded in 1774, between Turkey and Russia, the Hospodars of Moldavia and Wallachia, placed under the protection of Russia, are each entitled to be represented by a *chargé d'affaires*, being a member of the Greek Church, at Constantinople.

According to Vattel, a State which is under protection, or which has contracted an unequal alliance, has retained, if it have not expressly renounced the right of Embassy. (d)

The Princes and the States of the German Empire, at the *time Vattel wrote, although under feudal subordination to the Emperor [*136] (*quoique (ils) relèvent de l'Empereur et de l'Empire*), preserved, in spite of his opposition, their individual right of Embassy, and since the Peace of Westphalia have resembled a republic of Sovereigns. (f)

CXVII. There is no doubt that confederated States are collectively entitled to the right of Embassy; the question as to the individual right of each member of the Confederation is one of more difficulty.

On the one hand, it may be argued (g) that the Sovereignty of each State is not impaired because it has entered into certain voluntary engagements with its neighbours, any more than the independence of an individual is forfeited, by his having entered into a voluntary engagement with another individual. But this must, after all, depend, both in the case of the State and of the Individual, very much upon the character and nature of the engagements, however voluntarily contracted.

The question can only be answered by reference to the terms and conditions of the union by which the different States are bound together. (h)

CXVIII. In the ancient Republic of the Seven United Provinces, the individual States were deprived of the right of Embassy, which was lodged in the assembly of the States-General. Holland and Zealand, however, had the singular privilege of presenting to the States the am-

(b) Bynkershoek, Q. J. P., l. ii. c. iii. Qui rectè legatos mittunt. Martens, s. 187. Vattel, l. iv. c. v. Heffters, s. 200. Klüber, s. 175.

(c) Klüber, s. 175, n. 6.

(d) L. iv. c. v. s. 58.

(f) L. iv. c. v. 859.

(g) Vattel, l. i. c. i. s. 10.

(h) Merlin, Ministre Public, s. 2, v.

bassadors designated for England and France. Holland chose one, and Zealand the other.

Holland had also the right of sending a subject of its province, with the Embassies from the other States, which were composed of two or three persons.

CXIX. The United States of North America, in their first Federal Act, gave the Right of Embassy to each State to be exercised with the [*137] consent of Congress. The President, *however, exercised the executive power, nominated diplomatic agents, and concluded treaties. It is clear that foreign nations were exposed to great uncertainty in their relations with such a confederacy; and that the double authority was inconsistent with the object of the Union.

In their second Federal Act this defect was in a great degree remedied. This act forbids any State to enter into any treaty, alliance, confederation, compact, or agreement with any other State of the Union, or with a foreign State, without the consent of Congress.

Therefore Mr. Wheaton observes, "The original power of sending and receiving public ministers is essentially modified, if it be not entirely taken away by this prohibition."(*i*)

CXX. In both these instances of the Seven United Provinces and of the United States, there was one common centre of authority, in the hands of which the individual members of the Union had lodged the supreme executive power. It followed, therefore, that in that power was the Right of Embassy.

CXXI. In the Swiss Confederation, however, the case was different. Each Canton preserved its right of sovereignty. They had, indeed, annual diets, but these diets constituted no centre of authority. There was no one body or council which represented the Confederacy in its foreign relations. Each of the Cantons, therefore, contracted alliances as they pleased. The Roman Catholic Cantons were the only allies of France; and at the death of Louis XV., the Cantons of Berne and Zurich had contracted a particular alliance with each other. "Aussi," observes Merlin, "n'a-t-on jamais douté que chacun d'eux ne jouit du droit d'ambassade."(*k*)

CXXII. According to Vattel(*l*) there may be towns which are in [*138] subjection to the general authority of the country in which *they are situated, or to some other authority (*villes sujettes—unter landesherrliche Gewalt*), and which, nevertheless, enjoy the right of embassy; and he instances Neufchâtel, and Brienne in Switzerland, which had the *droit de bannière* (*jus armorum*), and as a consequence, the right of legation; but Merlin, with justice, combats this position, and says that it betrays that Vattel was a native of Neufchâtel, and wished to exalt the place of his birth, and Merlin adds, that a people cannot be sovereign and subject at the same time; and that, though Neufchâtel had great civil privileges, and had been reckoned among the allies of the Swiss Cantons, it had no right of legation according to theory, and that according to practice it had, under the *ancien régime*, acted through the

(*i*) Wheaton, vol. ii. p. 261.

(*k*) Merlin, *Ministre Public*, s. 2, v.

(*l*) Vattel, l. iv. c. v. s. 60. Des villes qui ont le droit de bannière.

ambassador of Prussia, who, by the ninth article of the treaty of Utrecht, had been recognised as "*Souverain seigneur de la principauté de Neufchâtel et Valengin.*"(m)

CXXIII. The question is often discussed in treatises, whether an usurper has the Right of Embassy.

The answer must depend upon two considerations:—1. Whether the country of the usurper has acknowledged him as the *de facto* sovereign; 2. Whether the foreign country has recognised him as such.

France, under Mazarin, for instance, admitted, without hesitation, the ambassadors of Cromwell and rejected those of Charles II. at the Congress of the Pyrenees.

England, in 1641, not long before the occasion just mentioned, admitted the ambassador of John IV. King of Portugal, though she had previously recognised only the Spanish Ambassador for Portugal.(n)

The consideration of this point has been in great measure anticipated in the chapter on Recognition.(o)

CXXIV. A Sovereign who has abdicated his throne has no title, *de facto* or *de jure*, to the Right of Embassy.

Upon this question all publicists refer to the celebrated *case of Leslie, Bishop of Ross, ambassador of Mary Queen of Scots. [*139]

CXXV. We have already discussed the legal *status* in England of that unfortunate princess. The question with respect to the rights of her ambassador in the same country arose in the following manner.

Mary Queen of Scots was allowed, after her unwarrantable detention as a captive in England, to send an ambassador to plead her cause before the commissioners appointed by Elizabeth to try her. She sent Leslie, Bishop of Ross, in 1567. During the period of his embassy, he was twice committed to prison upon the charge of endeavouring to effect a conspiracy in favour of Mary against Elizabeth.(p)

It appears from the State Papers of Lord Burleigh, that the English Government propounded to certain civilians the following questions.(q)

1. Whether an Ambassador, procuring an insurrection or rebellion in the prince's country, towards whom he is Ambassador, is to enjoy the privilege of an Ambassador?

2. Whether he may not, *Jure Gentium* et *Civili Romanorum*, be punished as an enemy, traitor, or conspirator, against that Prince, notwithstanding he be an Ambassador?

To these two questions they answered:—"Touching these two questions, we are of opinion, that an Ambassador procuring an insurrection or rebellion in the Prince's country towards whom he is Ambassador, ought not, *Jure Gentium* et *Civili Romanorum*, to enjoy the privileges otherwise due to an ambassador; but that he may, notwithstanding, be punished for the same."

3. Whether, if the Prince be deposed by the common authority of

(m) Merlin, *Ministre Public*, s. 2, ix.

(n) *Ibid.*, vi. vii.

(o) *Vide ante*, ch. iv.

(p) Camden's *Hist.* 113. Ward, vol. i. p. 486.

(q) Burleigh's *State Papers* by Murden, 18. Ward, vol. i. p. 487, &c.

[*140] the Realm, and another elected and invested of *that crown, the Solicitor or doer of his causes, and for his aid (although the other Prince do suffer such one to be in his realm) is to be accounted an Ambassador, or to enjoy the privilege of an Ambassador?

To this they answered:—"We do think that the Solicitor of a Prince lawfully deposed, and another being invested in his place, cannot have the privilege of an Ambassador; for that none but Princes, and such other as have sovereignty, may have Ambassadors."

4. Whether a Prince, coming into another Realm, and remaining there under custody and guard, ought, or may have there his Solicitor of his causes; and if he have, whether he is to be counted an Ambassador?

To this they answered:—"We do think that a Prince coming into another Prince's Realm, and being there under guard and custody, and remaining still a Prince, may have a Solicitor there; but whether he is to be accounted an Ambassador, that dependeth on the nature of his commission."

5. Whether, if such a Solicitor be so appointed by a Prince so flying, or coming into another Prince's Realm—if the Prince in whose Realm the Prince so in guard, and his Solicitor is, shall denounce, or cause to be denounced, to such a Solicitor or to such a Prince under custody, that his said Solicitor shall hereafter be taken for no Ambassador—whether then such Solicitor or Agent can justly claim the privilege of Ambassador?

To this they answered:—"We do think that the Prince to whom any person is sent in message of ambassador, may for causes forbid him to enter into his lands, or when he hath received him, command him to depart; yet so long as he doth remain in the Realm, *and not exceed the bounds of an Ambassador*, he may claim his privilege as Ambassador, or Solicitor, according to the quality of his commission."

This opinion of the English civilians is again referred to in this chapter, when the general subject of the inviolability of the Ambassador is discussed. In the passage which has just been cited, the proposition of [*141] International Law appears *to be correctly stated; but this, it will be seen, cannot be predicated of the other portions of this celebrated opinion.(r)

CXXVI. During the minority of the Sovereign, the Right of Embassy is lodged in the person or persons composing the Regency, or in the minor himself, according to the constitutional law of the country of the Sovereign.(s)

In France, during the Regency of the Duke of Orleans, the Cardinal

(r) See Preface to vol. i. of this Work, p. xxvii.

(s) Merlin, *Ministre Public*, s. 2, x. Klüber, s. 176, n. e.

Vattel, l. iv. c. iv. s. 42. *Ministres de la Nation ou des Régents dans l'Inter-règne*:—"Le droit d'ambassade, ainsi que toutes les autres droits de la souveraineté, réside originairement dans la nation comme dans son sujet principal et primitif. Dans l'inter-règne, l'exercice de ce droit retombe à la nation, ou il est dévolu à ceux à qui les lois ont commis la régence de l'état. Ils peuvent envoyer des ministres, tout comme le souverain avoit accoutumé de faire, et ces ministres ont les mêmes droits qu'avoient ceux du souverain."

Dubois negotiated the Triple Alliance of La Haye in 1717, by virtue of Credentials, Full Powers, and Instructions, which were given in the name of the King, then a minor.

In England, during the periods in which George III. was incapacitated by mental derangement for the transaction of affairs, the right of sending embassies was vested in the Prince of Wales.

The Republic of Poland, during the vacancy of the elective throne, exercised the Right of Embassy.

CXXVII. The maxim, *delegatus non potest delegare*, would apply, generally speaking, to cases where the ministers of a State attempted to delegate the Rights of Embassy.

If, however, the minister were armed, either by his original commission or by powers subsequently conferred, to appoint a delegate minister, it would be clearly competent to him to exercise the authority.

After the death of Gustavus Adolphus at Lutzen, in 1632, the Senate at Stockholm devolved the whole Government upon the Chancellor Oxenstiern.

*He nominated the illustrious Grotius as ambassador to France, giving him credentials in his (the Chancellor's) own name. Richelieu, who then governed France under Louis XIII., refused to receive Grotius, on the ground that he ought to have received his commission from the Senate. The Chancellor, however, demonstrated to Richelieu, that on this principle of rejection certain treaties entered into between France and Sweden would be affected; whereupon Grotius was received, but, as Wicquefort observes, as ambassador of Sweden, and not of the Chancellor who had given him his commission, and in virtue of the procuration of the Senate.(t)

Some time afterwards the Spanish ambassador nominated certain public ministers to carry on the negotiations of the Treaty of Munster. In their commission, he recited that, by the Full Power granted to him by the King of Spain, he (the ambassador) was authorised to substitute (*subrogare*) other persons for the purpose of assisting him in the execution of his office. Wicquefort remarks, that these ministers were received as the plenipotentiaries of the Crown of Spain, and not as the delegates of the ambassador.(u)

CXXVIII. The Viceroy of a province, especially of a distant province, has always been held *ex necessitate rei* to possess the Right of Embassy.(x)

During the period when Spain governed Naples by a Viceroy, Milan by a Governor, and Belgium by a Governor-General, the right to confer upon others the *jus legationis* was *frequently exercised by these high delegates of their Sovereign, and generally without contro- [*143]

(t) Merlin, *Ministre Public*, s. 2, x. Wicquefort, l. i. s. 3.

(u) Merlin, *ib.* Wicquefort, 16.

(x) Merlin, *ibid.* Various instances are cited by him, viz., in 1524, 1562, 1577, 1588, to which, no doubt, many others might be added.

Vattel, l. iv. c. v. s. 61, ascribes the *jus legationis* without hesitation to viceroys:—"Agissant en cela au nom et par l'autorité du souverain qu'ils représentent, et dont ils exercent les droits;" and he expressly affirms that the Viceroys of Naples, and the Governors of Milan and the Pays Bas, had this power.

versy; (y) though in 1646 the French ambassador in Switzerland succeeded in persuading the Cantons to refuse an audience at their General Assembly to the ambassador of the Governor of Milan, on the ground that this ambassador had no credentials from the Crown of Spain. (z)

During the time that Belgium was in the possession of Austria, foreign diplomatic agents were sent to reside at Brussels, the seat of the Governor-General's authority.

CXXIX. The same necessity and reasons have very generally caused the power of imparting the *jus legationis* to be granted to the European Governors of American or Asiatic dependencies.

The British Governor-General of India, the Spanish Governor of the Philippines, and the Dutch Governor of Java, are examples which readily occur.

The great Companies of European States, such as the Dutch, the French, and the British East Indian Companies, have often possessed this power. (a) But this authority cannot be presumed; it must be conferred by the special and express grant of their respective Governments. (b)

CXXX. International Law, strictly speaking, is not concerned with cases of rebellion. There is no doubt that rebellious subjects are not entitled to the *jus legationis* in their communications with their Sovereign; the foundation of the right is wanting. Nevertheless, when rebellion has grown, from the numbers who partake in it, the duration [*144] of it, the severity of the struggle, and other causes, into the terrible magnitude of a civil war, the emissaries of both parties (c) have been considered entitled to the privilege of ambassadors so far as their personal safety is concerned. (d) "In hoc eventu," Grotius says,

(y) Queen Elizabeth in 1569, having possessed herself of money sent from Spain to the Duke of Alva, refused to treat with the Duke's legate, "utpotè misso a non principe." But Bynkershoek truly says, "satis eo ipsa Regina ostendit frivola se exceptione uti, quam suum cuique reddere maluisse."—Q. J. P. l. ii. c. iii.

Zouch, t. ii. 4, s. 7. An qui imperium summum non habent legatos mittere possunt.

(z) Merlin, ib.

(a) Bynkershoek, Q. J. P. l. ii. c. iii.

(b) Merlin, ib.

(c) Bynk. l. ii. c. iii. would allow the *jus legatorum* to the sovereign only, at least until he be overthrown, and he cites with approbation two instances from Tacitus:—1. In which Cerealis sent the legate of the rebellious Batavi to Rome to be punished, (l. iv. Ibid. c. 75;) 2. In which Vitellius and the senate sent ambassadors to Vespasian, who he says, coming from those who were at that time *sui juris*, were entitled to the "*sacrum legatorum jus*;" whereas Vespasian's ambassadors would have been *rebellorum nuncii*. A third instance is that of Louis of Bavaria, in 1327, who seized the legates of the Pisans, "qui ipsum in urbem suam recipere detrectabant." Bynkershoek's own opinion is thus expressed; "Ut legatio pleno jure utrimque consistat, status utrimque liber desideratur, qui si ab una duntaxat parte liber sit, ab eâ missi tantum jure legatorum utuntur, ab aliâ missi ad externum principem, habentur pro nunciis, ad suum, pro subditis, sic ut in eos princeps exercere possit id jus, quod in reliquos subditos exercet.—Scissâ in factiones republicâ, interesse putem, penes quam partem stat rei agendi potestas, si penes unam, ut ante stetit, nec aliorum, ad res agendas desideretur consensus, etiam hæc sola rectè legatos mittit, et his competit quicquid veris legatis."

(d) Merlin, ib. xii.

Bynkershoek, however, observes (Q. J. P. l. ii. c. iii. :) "Sed non æquè constant, si subditi forte vel rebelles ad principes suos legatos mittant."—He instances the ambassadors from the Netherlands in 1566, put to death by Philip II., and admits

"Gens una pro tempore quasi duæ Gentes habetur."(*e*) Peace and order, under these circumstances, can only be restored, the shedding of blood can only be stayed, through the medium of negotiation: negotiation must be carried on through negotiators, and negotiators cannot act unless their personal securities *be guaranteed. (*f*) We read in [145] Livy, that when, in the early history of Rome, a Roman colony sent ambassadors to the Senate, they were warned to depart immediately, "ne nihil eos legationis jus, externo non civi comparatum, tegeret."(*g*)

And on this ground Cicero argued that the *Legati* of Antony should not be received. (*h*)

But we read in Cæsar that some such considerations as have been mentioned above, had caused the reception by Pompey of emissaries even from the fugitives and robbers of the Pyrenees; and by Cæsar's directions, his officers endeavoured, though in vain, to open a negotiation with Pompey, exclaiming, "Liceret me civibus ad cives de pace legatos mittere? quod etiam fugitivis ab saltu Pyrenæo prædonibusque licuisset, præsertim ut id agerent, ne cives cum civibus armis decertarent."(*i*)

In truth, it must always be a question of circumstances, and incapable of definition beforehand, when the citizen is to be considered as entitled to the privilege of an enemy rather than the punishment of a rebel. (*k*)

The great revolutions of the world, such as the Revolt of the Netherlands, and of the British Provinces in North America, (*l*) could only have

that this act was specified in 1581 as one of those which caused the final rejection of the Spanish dominion. Wicquefort, however, he says, is right (l. i. s. 2.) in saying that Philip was justified *jure stricto* in this deed; that the reason which founds the security of ambassadors, is that, being the subjects of another sovereign whose interests they are bound to represent, they do not by embassy lose their character and become subjects of the sovereign to whom they are sent; and that this reason was wanting in the case of the rebels, who were, and remained, subjects of Philip; he admits, however, that the *legatorum jus* might have been, and in 1609 was, granted to them.

(*e*) Grot. l. ii. b. 18, 2.

(*f*) "Verum habetur, justis duntaxat hostibus esse jus legationis, et quod ab aliis aliquando legati admissi sunt id permissum, non in eorum favorem sed boni communis causâ cum alias omnia reconciliationis media tollerentur, multò magis si hujusmodi legatis fides data est ea, omnino violanda non est."—Zouch, p. 2, s. 9, q. 16, De Jur. Fec.

(*g*) Liv. l. vi. c. 17.

(*h*) Phil. v. c. 8.

(*i*) Cæsar, De Bello Civili, l. iii. c. xix; see too, c. xviii.

(*k*) Merlin mentions two instances:—1. The negotiation of the Government of France through the mediation of England with the Reformers of Languedoc in 1704: a Treaty was signed between the crown and the rebels, differing only from other treaties in being signed, "très humble requête des Réformés du Languedoc au Roi." 2. The negotiation with the Vendéans and Chouans:

(*l*) See some admirable remarks by Mr. Burke, "On the strange incongruities which must ever perplex those who confound the unhappiness of civil dissension with the crime of treason." He adds:—"Wherever a rebellion really and truly exists,—which is as easily known in fact as it is difficult to define in words,—government has not entered into *such* military conventions, (e. g., as they had entered into with the revolted colonies in North America; but has ever declined all intermediate treaty which should put rebels in possession of the Law of Nations with regard to war," &c. (Letter to the Sheriffs of Bristol.) See, too, his remarks on the shameful violation of the Treaty of Limerick, ratified by King William III., under the faith of which Limerick and other Irish garrisons were surrendered in the war of the Irish Revolution or Rebellion.—Tracts on the Popery Laws, ch. iii. pt. 2.

[*146] been prevented from producing a *state of perpetual warfare throughout the greater part of the globe, by a partial application of the principle of International Law to the divided members of one and the same State.

[*147]

*CHAPTER III.

EMBASSY—RIGHT TO RECEIVE.

CXXXI. STATES which have the right to send, have the right to receive embassies(a) (*droit passif—passives Gesandtschaftsrecht.*)

The active and the passive right of legation are inseparably connected, and, as will be seen, the rule extends generally to the sending and reception of the same grade of diplomatic agents.

It is said by Klüber and Miruss(b) that dependent States have not necessarily the latter, because they have the former right. But it does not appear on what principle this position is to be maintained, and no authority is cited in support of it. On the other hand, Vattel, Martens, Wheaton, and other writers, do not qualify the general principle which has been laid down.

Perhaps, however, where the right to send is exclusively derived from treaty, as in the cases of Moldavia and Wallachia above cited, the right of reception not being mentioned in the instrument, cannot be inferred as a matter of necessary implication.(c)

But, as a general proposition, the right of sending and receiving embassies is inherent in all States; and it therefore follows, that to prevent the free exercise, in either way, of this right, would constitute a [*148] very heinous violation of International *Law, a crime which, inasmuch as it affected the interests, would justify the interference of all nations on behalf of the one which had been so injured.(d)

CXXXII. A State has a right to receive, as it has to send, an embassy; but a State is not under an obligation of duty to send or to receive an embassy.

Upon the consideration of this last point three questions arise, viz:

1. Is a State bound, as a general proposition, to receive an ambassador at all?
2. Is it bound to receive any ambassador duly commissioned?
3. Is it bound to allow a resident embassy within its territories (*legationem assiduam?*)(e)

CXXXIII. With respect to the first question, the sound opinion appears to be that a State is bound to give audience to an ambassador, and,

(a) Vattel, l. iv. c. v. s. 57. Martens, s. 183.

(b) Klüber, s. 176. Miruss, s. 80.

(c) Vide ante, p. 132.

(d) Vattel, l. iv. c. v. s. 63. "De celui qui trouble un autre dans l'exercice du droit d'ambassade."

(e) Zouch, De Jud. inter Gentes, p. 2, s. 4. "An legatum aliquando admittere non liceat."

except under most extraordinary circumstances, (*f*) to receive him for that purpose within its territories and at its Court.

If, however, such circumstances do exist, some place must be specified—Vattel suggests, the frontier—at which the ambassador's message must be received. A State may be aware that an ambassador is sent for a mischievous purpose, or, it may be, from a third nation for a purpose conceived to be inexpedient by the refusing State, e. g., reconciliation with another State. In these cases, *ex eo ob quod mittitur*, it may refuse the ambassador.

*CXXXIV. With respect to the second question, it may be unhesitatingly answered in the negative. It is in the discretion [**149*] of the receiving State to refuse the reception of a certain diplomatic agent; but it is not altogether an arbitrary discretion. Some reason must be alleged for the refusal: "Non enim," says Grotius, "omnes admitti præcipit gentium jus: sed vetat sine causâ rejici." (*g*)

A State cannot reasonably refuse to receive an ambassador on the grounds of sex. (*h*)

The League of Cambrai in 1508, was signed by Margaret *of Austria, in the name of her brother, Charles V. In the same [**150*]

(*f*) Grot. l. ii. c. xviii. s. 3. "Duo autem sunt de legatis quæ ad jus gentium referri passim videmus, prius *ut admittantur*, deinde ne violentur. De priore locus est Livii, ubi Hanno senator Carthaginensis in Annibalem sic invehitur: 'Legatos ab sociis et pro sociis venientes bonus imperator noster in castra non admisit: *jus gentium sustulit*,' quod tamen non ita crudè intelligendum est: non enim omnes admitti præcipit gentium jus: sed vetat sine causâ rejici—causa esse potest *ex eo qui mittit, ex eo qui mittitur, et ex eo ob quod mittitur*.'"

Vattel, l. iv. c. v. s. 65. "Sans des raisons très particulières." Wheaton's Elem. s. 1-261.

(*g*) Martens, s. 199. "Du choix de l'ordre et du nombre des ministres," s. 200. "Du choix de la personne du ministre;" and Pinheiro Ferreira's note on the latter. In this instance his complaint against Martens is just: viz. that he was bound to have expressed his own opinion, and not to have contented himself with a reference to other authorities. Grotius, note (*f*), last page. Bynkershoek, Q. J. P. l. ii. c. v. "Qui rectè legati mittantur."

(*h*) Zouch, De Jure Fec. p. 2, s. 4, Q. 9. "An fœminis legationes mandari possint," his opinion is, "sed et quandoque fœminæ legationibus obeundis maximè idoneæ habitæ sunt:" he relies entirely on authorities drawn from Roman writers. Merlin, Ibid., s. iii.

Bynk. Ibid., treats with contempt the argument that women were incapable by the Roman law,—a rule, he says, violated in practice by the Romans, but otherwise of no avail: "nam de suis subditis princeps statuit pro arbitrio suo, de alienis non etiam;" he observes that neither "ratio" nor "usus" exclude women from being diplomatic agents. Not "ratio" "in fœminis enim reperies quicquid in legatis jure desideraveris;" not "usus" for Paschalius in Legato, c. xx., has accumulated instances of their employment: he cites passages from Plato, Plutarch, and Tacitus to prove the abilities of women, and makes this curious Dutch pleasantry, "sed ne mulieribus, satis ut plurimum cristatis, cristos videor erigere, plura non addo."

The passages in the Roman law will be found, Dig. l. iii. tit. i. s. i. 5. ("Prætor edicto exceptit) *sexum dum fœminas prohibet pro aliis postulare*. Et ratio quidem prohibendi est, ne contra pudicitiam sexui congruentem alienis causis se immisceant, ne virilibus officiis fungantur mulieres."

Ib. L. t. 7, s. 4. "Sed et eos, quibus *jus postulandi* non est, *legatione* fungi non posse, et ideo in arenam missum non jure legatum esse Divi Severus et Antoninus rescripserunt."

Ib. L. t. 17, s. 2. "Fœminæ ab omnibus officiis civilibus vel publicis remotæ sunt," &c.

place, Louisa of Savoy, mother of Francis, signed a peace, sometimes called *Le Traité des Dames*.

It is said, that in the reign of Henry IV., France sent an ambassadress to Constantinople. In 1645, Louis XIV. sent la Maréchale de Guebriant to conduct to Poland the Princess des Gouzaques, bride to the King of Poland. Wicquefort says, erroneously, that she was the first female diplomatic agent. The Duchess of Orleans negotiated as Plenipotentiary the Treaty between France and England, which, in Charles II.'s time detached the latter country from its alliance with Holland.

"Minus frequentari," (says Bynkershoek) "*mulierum legationes res certa est, sed non minus certa, etiam olim minus fuisse frequentatas. Sed plus minusve sint fuerintve frequentatæ, jus principis non tollit, ejus igitur voluntas, etiam in hac causâ, suprema lex est.*"(i)

CXXXV. A State may reasonably refuse to receive one of its own subjects as a foreign diplomatic agent, especially if its constitution forbid the subject ever to put off his allegiance.

One very good reason for refusing such a diplomatic agent, is the expediency of avoiding the very difficult question which may arise, from a possible conflict between his privileges as a foreign ambassador with his present and former obligations contracted as a subject: for it will be seen that a class of these privileges is founded upon the fact that the bearer of them is not a subject of the country in which he is residing as an ambassador.

Bynkershoek(k) is of opinion that no objection exists to the employment of a subject; but he builds his opinion on the proposition that [*151] there is no reason why a subject should not *serve two masters, or rather be actively the subject of one and passively the subject of another. Yet Bynkershoek himself is obliged to qualify his proposition with the condition that the interests of the two masters do not come into conflict, or that, if they do, the ambassador take no part in them.

In France,(l) it has been for some time settled as a constitutional maxim that subjects are not admissible as ambassadors. An exception appears to have been formerly made in favour of the ambassador from Malta. The Swedish Law equally forbids the reception of a subject as a foreign ambassador. The German Confederation refuses upon special grounds to receive any Frankfort Burgher as the representative of any member of the Confederation, except of Frankfort itself.(m)

As a State may exercise its right of refusal absolutely, it may also exercise it conditionally.

A State may declare beforehand the terms under which it will consent to receive its own subject as a foreign diplomatic agent. But if the sub-

(i) Bynk. De Foro Leg. c. xi. Q. J. P. l. ii. c. v.

The "*Quæstiones Juris Publici*" were published after the treatise "*De Foro Legatorum*."

(k) De Foro Legatorum, c. xi.

(l) De Callières, in his *Traité de la manière de négocier avec les souverains*, speaks of this custom as peculiar to France; but if it ever was peculiar, it is not so now, for such a rule would probably be now adopted by all the Great Powers. Merlin, *Ib. v.* Bynk. De F. L. c. xi.

(m) Heffters, s. 202, n. 1.

ject be received without any such previously promulgated stipulation he will be entitled to the full *jus legationis*. But this is a point of which the discussion belongs to another place.(n)

CXXXVI. That the exile is in any case, though more especially if his return be forbidden by law, subject to the refusal of his own country, cannot be doubted;(o) the only doubt is, as will be seen hereafter, whether he can escape, by virtue of his ambassadorial character, punishment in the State which had exiled him, to which he has returned without permission, and therefore with an additional offence.

*In 1697, the English ambassador to France obtained permission from the Government of that country to include among his [*152] suite certain Frenchmen and refugees on account of their religion, without which permission Bynkershoek thinks France might have claimed them "*ut reversos exules*."(p)

Still more justly may a State refuse to receive a criminal whose sentence is yet unexecuted. A Dutchman condemned to a criminal punishment by the Dutch East India Company fled from India to England, and was sent by the latter country as a diplomatic agent to Holland. Immediately on his arrival at the Hague (1636,) the Dutch Company induced the Government to put him in prison, from which, however, he was shortly afterwards liberated, chiefly, according to Bynkershoek, because, the States General were very anxious at that particular period to be on good terms with England.(q)

The fact of the ambassador not being a native of the State which sent him would not alone afford a reasonable cause for refusal. The subject of a third country might be the domiciled citizen of the country which employed him as ambassador, and, even if he were not domiciled, no objection seems to lie against him, on the sole ground of his not being a native.

CXXXVII. The private rank or birth of the ambassador, who is sufficiently ennobled by his Sovereign's choice, can constitute no ground of refusal. The King of Spain employed Rubens as ambassador both to England and Holland (1633.) A State, however, would for its own honour justly refuse a notoriously scandalous person, and less justly but lawfully any person known to be personally disagreeable to the head of the State.(r)

*How far the religion of the ambassador can be considered an [*153] objection, will be presently discussed.(s) It is only necessary to state here that no State is bound to receive a Papal Legate or Nuncio, armed, either by specific instructions or by the general Canon Law, with

(n) Story's Comment. on the United States, l. 669. Miruss, s. 83.

(o) Bynk. Q. J. P. l. ii. c. v. Zouch, p. 2, s. 4.

(p) Q. J. P. l. ii. c. v.

(q) Ibid. Merlin, ib. iv.

(r) Wicquefort, l. s. 13. *L'ambassadeur doit estre agréable*. "Le mesme droit de gens qui ne permet pas qu'on fasse violence ou outrage au ministre qui a esté admis et reconnu, permet aux princes de ne point admettre un ministre dont ils puissent recevoir du déplaisir." Wicquefort gives a catalogue of ambassadors refused on this ground. The Duke of Buckingham, employed by Charles I., might well have been rejected both by Spain and France on account of the insolence and arrogance of his conduct.

(s) Vide post, RELIGION AND THE STATE. Heffters, s. 200, n. 4. Miruss, s. 94.

powers injurious to the Established Church or to the sovereignty of the State over all causes, ecclesiastical as well as civil. States have a right to refuse the reception of such a minister, or to demand that these powers be limited and defined, so as to be consistent with their safety, before the bearer of them be admitted.

The notification of the refusal to receive ought to be made, if possible, before the ambassador has left his own country, but it may be imparted openly on his arrival, or tacitly by not accepting the letters of credit.^(t)

CXXXVIII. The existence of a state of war between two nations by no means relieves them from the necessity of receiving each other's ambassadors, not, of course, for the purpose of residence, but of audience. It may be necessary to demand a passport or safe conduct, through the intervention of a third State or of a herald, and what it is necessary to demand may be refused; but the refusal cannot lawfully be grounded on the mere existence of a state of war, for the greater the evil the more stringent is the obligation upon nations to adopt the readiest means of putting an end to it,^(u) and especially those which are most likely to prevent or stay the shedding of blood.

[*154] CXXXIX. We have now arrived at the discussion of the *third question propounded, viz.:—Is a State bound to allow a resident embassy (*legationem assiduam*) within its territories?

The continuous residence of an embassy is, to speak strictly, a matter of comity, and not of strict right.^(x)

Nevertheless, so long a custom and so universal a consent has incorporated this permission of continuous residence into the practice of nations, that the gross discourtesy of refusing it would require unanswerable reasons for its justification, and would place the refusing in so unfriendly an attitude towards the refused State, as to be little removed from a condition of declared hostility:

Grotius, indeed, says, “Optimo autem jure rejici possunt, quæ nunc in usu sunt legationes assiduæ, quibus quam non sit opus,^(y) docet nos

(t) Miruss, s. 82.

(u) Vattel, l. iv. c. v. s. 67. *Comment on doit admettre les ministres d'un ennemi.*

(x) Wheaton, El. 2, 261, 2. Merlin, lb. s. 3. Heffters, s. 200. Ward, vol. ii. p. 484.

Lord Coke, speaking of Henry VII., says, “that wise and politique king would not in all his time suffer Lieger (*i. e.* resident) ambassadours of any foreign king or prince within his realm, nor he with them; but upon occasion used ambassadours.”—4 Inst. 155.

Charles I. expressed resentment against the Dutch for not sending a resident embassy to England.—Wicq. Mem. touch. les Ambassadeurs, 25.

In 1660, a noble member of the Polish Diet complained of the continued residence of the French ambassador, “que le sejour de l'ambassadeur estoit suspect, parceque les ambassadeurs ont accoustumés de se retirer dès que leur négociation est achevée.”

In 1668, an attempt was made by various members of the Diet to send away all ambassadors; it was resisted by the king and senate, but is said to have been one of the chief causes of the dissolution of the Polish Diet.—Wicquefort, l. viii.

(y) The Justinian law was unquestionably adverse to the notion of a resident ambassador. It had no idea of protecting foreign commerce, “*perniciosum urbibus mercimonium*” (Cod. l. iv. § 63, s. 3), which it forbade nobles to exercise, and which it conceived might lead to a revelation of the secrets of imperial policy. The Code contains a very curious law, beginning:—“Mercatores tam imperio nostro quam

antiquitas cui illæ ignoratæ;"(z) but *it must be remembered that since this opinion was expressed, a usage of two additional [*155] centuries has imparted, according to the principles laid down in an earlier chapter(a) of this work, a character approaching to that of positive law upon this institution of resident embassies.

Vattel(b) therefore declares, that even in his time the custom was so deeply rooted as to require excellent reasons for its abrogation by any individual State.

*CHAPTER IV.

[*156]

EMBASSY—GENERAL STATUS.

CXL. WE have now considered the Rights and the Duties incident to the sending and receiving of embassies. The next subject for discussion is the *Status* which International Law ascribes to those who are so sent, and to those who are so received.

This *status* is composed of rights *stricti juris*, resting upon the basis of natural law and therefore immutable, and of privileges, originally not immutable, but so rational in their character, and so hallowed by usage, as to be universally presumed, and to become matter of strict right if their abrogation have not been formally promulgated (a case almost inconceivable) before the arrival of the ambassador. The former are usually described under the title of inviolability, the latter under the title of extritoriality.(a) It is with the former that we are at present concerned.(b)

CXLI. The right of sending embassies being *established, the personal inviolability (*inviolabilitas, inviolabilité, Unverletzbarkeit*) of the ambassador follows as a necessary consequence. [*157]

Persarum regi subjectos, ultra ea loca, in quibus fœderis tempore cum memoratâ natione nobis convenit, nundinas exercere minimè oportet: *ne alieni regni (quod non convenit) scrutentur arcana,*" &c.—Ib. s. 4.

(z) L. ii. c. xviii. s. 3, 2.

(a) Vide ante, vol. i. chap. v.

(b) Vattel, l. iv. c. v. s. 66. *Des Ministres résidents.* "La coutume d'entretenir partout des ministres continuellement résidents, est aujourd'hui si bien établie, qu'il faut alléguer de très-bonnes raisons pour refuser de s'y prêter sans offenser personne." Miruss, s. 82.

"Hodie tamen ita usurpantur ut sine illis amicitia vix stabilis inter populos diversos coli videatur etsi nec minus usum habeat exploratorum."—Huberus de Jure Civili, l. iii. c. xii.

(a) The necessity of the case, the usage of foreign writers, the great convenience of the term, will, it is hoped, justify the attempt to naturalize this word.

(b) Vattel, l. iv. c. v. s. 55, ib. c. vii. s. 81, & s. 103. "Nous avons déduit l'indépendance et l'inviolabilité de l'ambassadeur des principes *naturels et nécessaires* du droit des gens—ces prérogatives lui sont confirmées par l'usage et le consentement général des nations."

Heffters, s. 204, "ein so von selbst sich verstehendes Recht." S. 205. "In der Natur der Sache ist nun ein Mehreres nicht begründet abs." u.s.w.

Klüber, s. 203. "Den Gesandten räumt theils das natürliche Völkerrecht theils das positive der Europäischen Staaten besondere Vorrechte ein." u.s.w.

Every foreigner, indeed, is under the protection of the State in which he is commorant, and is so far inviolable.

But this attribute is in a special manner ascribed to the representative of a Foreign State, in whom the image of his sovereign and the majesty of his country are as it were visibly present; therefore the expression of sanctity (*sanctitas*, *personne sacrée*, *Heiligkeit*) is often applied by jurists, philosophers, and historians of all ages and countries, as applicable to the bearer of an embassy.(c)

CXLII. Any offence committed against their person is or ought to be considered by the State as an offence against the State itself (*crime d'état*.)

The injury done to an ambassador is not merely an injury done to the Sovereign and country which he represents, but a violation of the common welfare and general safety of all nations.

[*158] Therefore there is a peculiarity incident to this right,(d) *viz., that an infringement of it, unlike the invasion of particular national interests, becomes immediately and directly a matter of general International concern, and entitles all nations to demand and enforce atonement for the offence and punishment of the offender.

CXLIII. The atonement and punishment, moreover, are to be measured by a standard different from that which might satisfy an injury done to a private subject.(e)

(c) Grotius, l. ii. c. xviii. s. 1. "Passim enim legimus *sacra* legationum, *sanctimoniâ* legatorum . . . *sancta* corpora legatorum."

Ib. s. iv. 5. "Quare omnino ita censeo, placuisse gentibus ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subicit, exceptionem pateretur in legatis, ut qui sicut fictione quâdam habentur pro personis mittentium *senatûs faciem secum attulerat, auctoritatem reipublicæ*, ait de legato quodam M. Tullius," &c.

Bynkershoek, De F. L. c. v. De Sanctitate Legatorum, &c. "Plus scire attinet, quâ ratione legati apud omnes, ut dixi, gentes habeantur *sancti*—Et si *sanctum* id sit, *quod ab injuriâ hominum atque defensum munitum est*, ut esse dicit Marcianus in l. 8, pr. ff De Rev. Divis., utque ex proprietate verbi deducit Festus in V. *sanctum*, dicendum videbatur sanctitatem id legatis præstare, ne dicto factore offendere liceat, quia imaginem principis sui ubique circumferunt, quia pacis et fœderum nuntii sunt et proxenetæ, et sine his gentium societas et beata quies salva esse nequit."

Vattel, l. iv. c. vii. s. 81, & s. 92. "L'inviolabilité du ministre public, ou la sûreté qui lui est due, *plus saintement et plus particulièrement* qu'à tout autre étranger ou citoyen." Martens, s. 214. Klüber, s. 203.

(d) Whether Vattel be right or not in the application of the principle of the law to the case of the ambassadors of Francis I., put to death by the Governor of Milan, through which city they were travelling to Constantinople, the principle which he lays down is sound and true: "Et comme il n'en donna point de satisfaction convenable, François I^{er} avait un très-juste sujet de lui déclarer la guerre, et même de demander l'assistance de toutes les nations. Car *une affaire de cette nature* n'est point un différent particulier, une question litigieuse, dans laquelle chaque partie tire le droit de son côté; *c'est la querelle de toutes les nations*, intéressées à maintenir comme sacrés le droit et les moyens qu'elles ont de communiquer ensemble et de traiter de leurs affaires."—l. iv. c. vii. s. 84. "Quiconque fait violence à un ambassadeur ou à tout autre ministre public ne fait pas seulement injure au souverain que ce ministre représente; il blesse la sûreté commune et le salut des nations; il se rend coupable d'un crime atroce envers tous les peuples."—Ib. s. 81.

(e) "Quid igitur est præcipuum in legatis? hoc videlicet, ut in eos, qui legatos malè habent, severius animadvertatur, atque ita ob personarum sanctitatem pœna atrocior statuatur, quam solet statui in eos, qui privatum quemcunque læsissent."—Bynk. De Foro Leg. c. v. Miruss, s. 337.

An ambassador, it will be seen, may, with, but not without(*f*), the consent of his master, waive his privilege of exemption from the local tribunals; but if wrong has been done or an insult offered to him, he cannot appear as a common person demanding satisfaction in a court of justice; he has a right to demand that the State in which he is residing prosecute the wrongdoer as a public criminal.(*g*)

CXLIV. There is another peculiarity incident to this right which requires observation. The Civil Law of Rome expressed a sound principle of jurisprudence, in declaring that it was competent to a person to waive any advantage *which had been introduced, for his sake [*159] only, into a covenant.(*h*)

The Sovereigns, therefore, of the State may waive the rights due to them in the person of their ambassadors, but the ambassadors themselves have no such liberty, because these rights are not incident to their office for their own private convenience, but for the honour of their Sovereign, the good of their country, and the welfare of all nations.(*i*)

This principle is to be found in the Roman Law, even with respect to the *legatus* of a subordinate city or province of the empire. Suits might not be instituted against him: "Julianus, sine distinctione denegandam actionem. Merito; ideo enim *non datur actio, ne ab officio suscepto legationis avocetur:"(*k*) and again:—"De(*l*) [*160] eo autem qui adiit hæreditatem Cassius scribit, quamvis Romæ adierit hæreditatem, non competere in eum actionem, ne impediatur legatio: et hoc verum est."

This proposition as to the incompetency of the representative to consent to the renunciation of rights of inviolability belonging to his con-

(*f*) United States v. Benner, 1 Baldwin's (American) Reports, 240.

(*g*) Vattel, l. iv. c. viii. s. 3.

(*h*) Cod. l. ii. t. 3. De Pactis, s. 29. "Si quis in conscribendo instrumento, &c., &c., quare et in hac causâ pacta non valeant, cum alia sit regula juris antiqui, omnes licentiam habere, his, quæ pro se introducta sunt, renunciare."

(*i*) Bynkershoek, De Foro Leg., at the end of his xxiii. chapter, "Legatus an jurisdictionem prorogare et fori privilegio renunciare possit," arrives at pretty much the same conclusion as is expressed in the text here: "Ego vero, quicquid earum rerum sit, non ausim dicere, legatum, inconsulto principe, juri suo renunciare posse; ad quid enim legatorum privilegia, quam ut ipsi principibus suis magis utiles sint, et eorum legatio nullâ re impediatur? Magis igitur hæc privilegia pertinent ad causam Principis, quam ipsius legati; sibi renunciatione sua legatus nocere potest, Principi non potest." Then follows a position doubtfully expressed even at the time he wrote, and which can now be scarcely admitted at all:—"Atque ita, consultâ ratione, forte dicendum est, legatum in causâ delicti nunquam privilegio fori renunciare posse, in causâ civili non aliter, quam ut adversus eum jus dicatur, non ut sententia executioni mandetur, in quid per eam impediretur legatio, ut in causâ criminali tantum non semper impediri solet. Sed ad manum non sunt ea gentium exempla, ut ex jure gentium eâ de re possim constituere."

For the "ratio," he refers to the passage cited below from the Digest. In neither case, at the present time, can, it is conceived, the ambassador *rege inconsulto* forego his right. De Foro Leg. c. xxiii. in fine.

Vattel, l. iv. c. viii. s. xi. "Mais si l'ambassadeur vent renoncer en partie à son indépendance et se soumettre à la juridiction du pays pour affaires civiles, il le peut sans doute, pourvu que ce soit avec le consentement de son maître.—Sans ce consentement, l'ambassadeur n'est pas en droit de renoncer à des privilèges qui intéressent la dignité et le service de son souverain, qui sont fondés sur les droits du maître, faits pour son avantage et non pour celui du ministre."

(*k*) Dig. l. v. t. 1, De Judiciis, &c., s. 24.

(*l*) Ibid. s. 26.

stituent, is also applicable, by the practice of nations, if not by the reason of the thing, to the renunciation of the privileges of extraterritoriality.

CXLV. These *rights of inviolability*, flowing from the Law of Nature and the reason of the thing, are applicable to all societies, and therefore unalterable by any individual member of the community of nations.

These rights have been acknowledged and respected since the dawn of civilization in all ages, and are not without vestiges of their recognition even among barbarous tribes.

Grotius at the outset of his excellent chapter *De Legationum Jure*, observes that the sanctity of ambassadors, the sacred rights of embassies, the inviolability of treaties, are topics abounding in the works of writers of all ages.^(m)

[*161] *Bynkershoek remarks, that all treatises on the *jus legationis* contain an accumulation of passages from Greek and Latin authors upon the inviolability of ambassadors:—"et quo quis eruditior fuit eo plures auctoritates attulit ad rem, quam nemo negat, probandum."

In the few observations which follow, it is hoped that the censure of Bynkershoek will not be incurred.

CXLVI. Even the Israelites, being under the peculiar dispensation of the Mosaic law, appear to have acknowledged the inviolability of ambassadors.⁽ⁿ⁾

The Egyptians clothed the functions of the ambassadors with a religious character, and are thought by some to have possessed a written code upon the subject; and this code Pythagoras is said to have introduced into Greece. The Greeks^(o) held in high estimation and invested with

(m) "Passim enim legimus sacra legationum, sanctimoniam legatorum, jus gentium illis debitum, jus divinum humanumque, sanctum inter gentes jus legationum, fœdera sancta gentibus, fœdus humanum sancta corpora legatorum."—*Ib.* L. 2, c. 18, s. 1.

De Foro Leg. c. v. in prin.: "Ad satietatem sufficere possunt quæ in hanc rem congesserunt:—videlicet, Jacobus Cujacius, l. xi. observ. c. 5. Albericus Gentilis, De Leg. l. ii. c. 1 & 14. Hugo Grotius (princeps juris publici magister,) l. ii. c. 18, s. 1 & 6 in note, adque eum locum *tantum non omnes Grotii interpretes.*"

Wicquefort, l. i. c. 27, 28.

Montesquieu, De l'Esprit des Loix, l. xxvi. chap. 21.—"Qu'il ne faut pas décider par les lois politiques les choses qui appartiennent au droit des gens.

"Les lois politiques demandent que tout homme soit soumis aux tribunaux criminels et civils du pays où il est, et à l'animadversion du souverain.

"Le droit des gens a voulu que les princes s'envoyassent des ambassadeurs; et la raison, tirée de la nature de la chose, n'a pas permis que ces ambassadeurs dépendissent du souverain chez qui ils sont envoyés, ni de ses tribunaux. Ils sont la parole du prince qui les envoie, et cette parole doit être libre.

"Aucun obstacle ne doit les empêcher d'agir. Ils peuvent souvent déplaire, parcequ'ils parlent pour un homme indépendant. On pouvait leur imputer des crimes, s'ils pouvaient être punis pour des crimes; on pourrait leur supposer des dettes, s'ils pouvaient être arrêtés pour des dettes. Un prince qui a une fierté naturelle, parlerait par la bouche d'un homme qui aurait tout à craindre. Il faut donc suivre, à l'égard des ambassadeurs, les raisons tirées du droit des gens, et non pas celles qui dérivent du droit politique; que s'ils abusent de leur être représentatif, on le fait cesser, en les renvoyant chez eux: on peut même les accuser devant leur maître, qui devient par-là leur juge ou leur complice."

(n) Chronicles, c. xix.

(o) W. Wachsmuth, Jus Gentium quale obtinuit apud Græcos. Alber. Gentilis, c. xvii. Quædam Græcorum.

religious sanctity the office of ambassadors (*πρέσβεις*;) and the inviolability of heralds (*κήρυκες*, *caduceatores*,) who were also priests, appears to have obtained in the earliest periods of their history. It is probable that from the Greeks was derived *to the Romans the very remarkable institution of the Collegium Feciale. [*162]

CXLVII. The concourse of lawless adventurers and freebooters who laid the foundations of Imperial Rome built out of the resources of their own genius, the chief foundations of their domestic society. The principles of civil obedience, the acknowledgment of the relations of family, the administration of justice, the ordinances of religion, the institution, in fine, of the State, seem, according to the doubtful notices of their early annals, to have found their chief root in their own character, as developed by the exigencies of their condition. (p)

This was not the case, however, with respect to the acknowledgment and observance of the rules of right and the principles of justice in their intercourse with other communities. That the necessity of any such rules and principles should, even in the infancy of her existence, have been recognized by Rome, and that this recognition should have been made a part of her constitution, is a fact which distinguishes her from all other nations, and which, at the time, gave early presage of that extraordinary sagacity which characterized her subsequent career. That such necessity should have been felt, was most remarkable; that it should have been supplied from without, and not, like the other parts of her constitution, from within—that a regular code of rites and observances, respecting a branch of International Law, should have been at once imported into Rome from a foreign source, is also a circumstance of great peculiarity. The account is given by Livy : (q)—“ Ut tamen quoniam Numa in pace religiones instituisset, a se (Anco Martio) bellicæ ceremoniæ proderentur, nec gererentur solùm sed etiam indicerentur bella aliquo situ, jus ab antiquâ gente *Æquicolis, quod nunc *Fetiales* habent descripsit quo res repetentur. (r) [*163]

The Fecial institution lasted as long as the free Republic. It withered in the civil wars; and though the name and the title of its chief officer, that of *Pater Patratus*, existed in the time of the first Cæsars, all trace of both name and thing disappears in the reign of Tiberius.

The office and functions of the ambassador, however, retained the sacred inviolability which had been among the attributes of the Feciales.

(p) Geist des römischen Rechts, u.s.w., von Rudolph Ihering: Leipzig, 1852.

(q) Lib. I. c. 32.

(r) “*Legati nomen fecialis tenet cum ad fœdus feriendum aut indicendum bellum proficiscatur, ad jubendum alicunde aliquem decedere, ad aliquem dedendum.*”—Alber. Gentilis, l. i. c. 12, De Jure Feciali et Patre patrato. Grot. ubi sup. s. 10, in fine. Vide ante, vol. i. App. p. 491.

[*164]

*CHAPTER V.

AMBASSADORS—ROMAN LAW.

CXLVIII. (a) It is necessary to notice certain passages relating to the *jus legationis*, which occur in the Digest of Justinian, for two reasons:—First, because, though often misapplied, they have furnished materials for writers on this branch of international jurisprudence. Secondly, because they do contain principles, and, in one instance at least, a direct enactment, applicable to the present subject.

The “legati” mentioned in the Roman Law were not ambassadors from foreign independent states, but delegates(b) from provinces or municipalities subject to the Roman empire. It is to these officers that the passages in the Digest apply, with one very memorable exception. That exception is to be found in the opinion of Pomponius, set forth under the title “De Legationibus.” “Si quis” (he says) “*legatum hostium pulsasset contra jus gentium id commissum esse existimatur, quia sancti habentur legati: et ideo cum legati apud nos essent gentis alicujus cum bellum eis indictum sit, responsum est, liberos eos manere. Id enim* [*165] *juri gentium conveniens esse. Itaque eum qui legatum *pulsâ-* set, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondere.”(c)

It is impossible to deny that here is a plain and direct incorporation of that important part of International Law, which relates to ambassadors, into the Municipal Law of Rome.

But in every other instance the Justinian law respecting “legati” applies, as has been observed, to a class of deputies or delegates from portions of the empire.

With respect to Criminal Jurisdiction, these laws pronounced the legate and the members of his suite to be justiciable at Rome for offences committed during their legation, though for offences previously committed they might claim to be tried at home (*domum revocare*);(d) and this law was chiefly relied upon by the civilians, as warranting their opinion that Leslie, Bishop of Ross, the Ambassador of Mary Queen of Scots, was justiciable in England for seditious practices committed in that kingdom. This obvious misapplication of the Roman Law has been commented upon by most subsequent jurists.(e)

(a) Bynkershoek devotes a whole chapter to this subject (De Foro Leg. c. vi.,) which begins, “Quamvis non de Populi Romani, sed de Gentium jurisprudentia agamus, non abs re tamen erit de Jure Romano quædam præmonuisse, cum qui *id audit, vocem ferè omnium gentium videatur audire, cumque etiam id jus, quod certâ ratione in quibusdam legatis constitutum est, ad omnes alios imprudentia quorumdam traduxerit.*”

(b) “Tantum non erant procuratores et mandatorii.”—Bynk. ib.

(c) Dig. L. t. vii. s. xvii. de Legationibus. Tit. lxiii. Cod. de Legationibus.

(d) Bynk. c. vi.

(e) Queen Elizabeth’s council were wiser than her lawyers, as Wicquefort observes: “Et de fait,” (he adds) “il y a lieu de douter s’ils ne s’étoient point trompés en ce qu’ils répondent sur le premier article: et si les Lois Romaines, sur

With respect to Civil Jurisdiction, the Justinian laws conferred on *legates* the privilege of claiming to have civil actions brought against them on account of obligations contracted before the period of their legation, remitted to their domestic tribunal (*revocandi domum*,) on the ground that the business of their legation might be otherwise delayed or impeded. (f)

But this privilege was not extended to obligations contracted **"legationis tempore,"* on the ground that a facility would otherwise be given them of fraudulently possessing themselves of the property of other persons. [*166]

By the Roman Law a person might *"domum revocare"* actions brought against him at Rome for obligations contracted not at his own home, but *"intra provinciam;"* but if, being himself the plaintiff, he remitted the cause home, he was compelled in his turn to defend himself there against all actions that might be brought against him.

The Roman Law, however, would not allow the legate to bring such actions, because he could not in his turn, on account of the avocations of his legation, be subject to actions at the suit of others. During the time of his legation, therefore, he could neither be plaintiff, or agent for another in a civil action—a rule which Bynkershoek is strongly of opinion ought to be adopted by International Law with respect to ambassadors. It is manifestly unjust, he thinks, that an ambassador should be, as by International Law he is, permitted to bring an action, and not be amenable to one brought against himself. (g) Upon the same ground, viz., *"ne ab officio suscepto legationis avocetur,"* no action *in rem* could be brought against a legate, respecting any possession acquired by him, previously to his legation.

The Roman Law therefore, relating to legates, bore some resemblance to, and was not without its effect upon, International Law respecting ambassadors; though the circumstances of the legate being the subject of the Prince to whom he was sent, and of his being the deputy from a portion of the same kingdom, materially affected the introduction of the principles of the former into the latter law. *"Inter utrosque,"* (Bynkershoek says) *"fuit aliqua similitudo et *inde quod de illis prædicatur sæpe et de his prædicari poterat, at non semper et ubique."* (h) [*167]

CXLIX. The Christian Church appears to have afforded the earliest instance of resident ambassadors, (i) as she probably did of representative assemblies.

We read in the Novells of Justinian of *apocrisiarii*, (k) sometimes also

lesquelles ils se fondent, ne doivent pas estre appliquées à ces ambassadeurs, que les villes municipales, ou les colonies Romaines, envoyaient au Sénat ou à l'Empereur."—L'Ambassadeur et ses Fonctions, l. i. c. xxvii.; et vide post.

(f) Bynk. ubi supr.

(g) Vide post, p. 192, &c., and 201. Courts of justice have held that a Plaintiff Ambassador is liable to counter-demands in a court of justice, and that a prior assault by a Foreign Minister will excuse a battery committed on him in self-defence. Vide post, p. 182.

(h) Bynk. c. vi.

(i) Heffters, s. 199.

(k) *"Apocrisarius, ambasciatore o procuratore, ἀποκριτάριος, legatus alicujus vel procurator qui pro eo respondet, ab ἀποκρίνομαι, respondeo."*—Forcellini, Lexicon.

called *responsales*, who seem to have discharged the functions of resident ambassadors for the affairs of the Church at the court (in *Comitatu seu Principis curiâ*) at Constantinople.

The right of sending these officers appears, strictly speaking, to have been a privilege of the Patriarchs only, though occasionally exercised by the Archbishop of Ravenna and other Metropolitans. Afterwards, the Apocrisarius or Responsalis was chiefly employed by the Pope at the court of the Emperor.

[*168] The Canon Law makes specific mention of the "*legatorum *non violandorum religio*," in its enumeration of the subjects about which the *jus gentium* was universally admitted to be conversant.^(l)

The Church, however, was not always able to enforce the observance of this important part of International Law. And among the many deeds of lawlessness^(m) which disfigure the period usually designated as the Middle Ages, are to be found some,⁽ⁿ⁾ though not many, violations of the sacredness of the ambassadorial person.

To these violations the Papal claim of universal dominion and the true spirit of chivalry were alike opposed. The Emperor Frederic I. secured the safety of the Papal legates who had misconducted themselves towards him. The oppressive tax upon foreigners, the *droit d'aubaine*, was even in France, where it long maintained its footing, remitted in favour of the foreign ambassador. The Crusaders scrupulously respected the character of the ambassador, even in their infidel foe.

CL. The infidel was taught by his Koran the sacredness of embassies,

Apocrisarius, Du Cange,—a very full and careful account.

"*Responsalis*, nuntius: interdum et Apocrisarius et qui *Responsa* seu negotia Ecclesiastica peragebat Theodorus *Responsalis venerabilis Ecclesiæ Carthaginis*, in Constit. Justiniani de Africanâ Ecclesiâ," &c.—Du Cange v. Responsalis, i.

See Nov. 6, c. ii. "Ne Episcopus ultra annum extra Ecclesiam suam degat. Et illud," &c. "Propterea sancimus si quando propter ecclesiasticam occasionem inciderit necessitas, hanc aut per eos qui res agunt sacrarum ecclesiarum (quos apocrisarios vocant) aut per aliquos clericos huc destinatos aut œconomos suos, notam imperio facere, aut nostris administratoribus ut impetrant quod competens est," &c. In c. iii. of the same work: "Ne Episcopi ad comitatum Principis accedent absque systaticis literis." The bishops are ordered, "aut per eos qui vocantur Referendarii sanctissimæ majoris Ecclesiæ (i. e. Constantinople), aut per religiosos Apocrisarios cujusque diœceseos sanctissimorum Patriarcharum suggerere si Imperio," &c.

See also Nov. 123, c. xxv. "De Apocrisariis," c. xxvi. "Ne Episcopi legationis tempore conveniantur."

(l) C. ix. Dist. 1. "*Jus Gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, foedera, paces, induciæ, legatorum non violandorum religio*—hoc inde *jus gentium* appellatur quia eo omnes fere gentes utuntur."

(m) Ward, l. 280–8.

(n) Pütter, Beiträge zur Völkerrechts Geschichte, 169–173. Miruss, s. 333.

After all that has been said on this subject, many of the examples cited resolve themselves into cases where *safe conduct* in time of war had not been granted, and where the ambassador was seized in his passage through a third country. The passage cited by Ward from Joinville's Life of St. Louis, p. 67, certainly speaks of it being, in the 13th century, the received custom in Christendom as well as heathendom, when war broke out between princes, to detain as a prisoner and slave the ambassador of a prince who happened to die. But this is stated parenthetically, with respect to Christendom, in the account of the Patriarch of Jerusalem being made captive to the Emirs of Egypt, and cannot be taken to be true as a general proposition with respect to the usage of Christian princes.

though he sometimes interpreted the injunction as being applicable only to Mahometan nations,^(o) and *the Turk for a long time persisted in considering the European ambassador as a tolerated spy in [*169] time of peace, and a hostage to be imprisoned at the breaking out of war.

CLI. Lastly, it should be observed, that even during the ages of violence and lawlessness in Europe, it was the principle of the Roman Law, which afterwards took deep root in Christendom, that an injury done to an ambassador should be treated by the Sovereign of the wrongdoer as a crime against the State.

*CHAPTER VI.

[*170]

EMBASSY—EXTENT OF INVIOABILITY.

CLII. It is not probable that it will ever be necessary to draw the line of demarcation in practice between the Rights of inviolability, founded upon the Law of Nature (*jus gentium primævum*), and the Privileges of Exterritoriality, founded upon usage and implied consent (*jus gentium secundarium*), and in most Treatises they are treated of together and with little if any distinction.^(a)

CLIII. Nevertheless, it concerns the interests of International Jurisprudence, considered as a science, and it may be necessary in practice to establish this distinction. What then are the limits within which this strict Right of Inviolability is circumscribed?

1. To what class of diplomatic agents?
2. To what persons other than the diplomatic agents themselves?
3. To what subject-matter does it extend?
4. At what period of time does it begin?
5. Over what period is it extended?
6. Is it affected by the breaking out of war between the country which sends and that which receives the ambassador?

These are questions which require as precise a solution as the nature of the subject will admit.

First,—The Right of Inviolability extends to all classes of public ministers who duly represent their Sovereign or their *State. [*171] This may be now considered as an axiom of International Law.^(b)

Secondly,—The right attaches to all those who really and properly belong to the household of the ambassador—such, to use the ordinary description, as accompany him as members of his family or of his suite.^(c)

Such appears to be the best opinion upon this point, though, as will be seen hereafter, it has been a matter of controversy whether this right

(o) Miruss, s. 333. Merlin, *Ministre Public*, v. iii.

(a) Miruss, ss. 333–341, is very able and learned upon the point.

(b) Vide post, p. 217, as to their privilege of exterritoriality.

(c) Vide post, pp. 196–7, as to exterritoriality.

attaches under all circumstances in an equal degree to the suite, as to the ambassador himself. (*d*)

Thirdly,—The right applies to whatever is necessary for the discharge of ambassadorial functions, (*e*) “*nam omnis coactio* (Grotius says) *abesse a legato debet, tam quæ res ei necessarias, quam quæ personam tangit, quo plena ei sit securitas.*” (*f*) It seems to follow, therefore, that he is entitled, among other immunities, to an exemption from all criminal proceedings, and to freedom from arrest in all civil suits.

The private effects, and, above all, the papers and correspondence (*g*) of the ambassador are inviolable.

The questions as to members of his suite who are *subjects of the State to which he is sent*, and the franchise of his hotel, are reserved for future consideration.

[*172] * (*h*) Fourthly,—The Right attaches from the moment that he has set his foot in the country to which he is sent, if previous notice of his mission has been imparted to it, or in any case, as soon as he has made his public character known by the production either of his passport or his credentials.

Fifthly,—The Right extends, at least so far as the State to which he is accredited is concerned, over the time occupied by the ambassador in his arrival, his sojourn, and his departure.

(*i*) Lastly,—The Right is not affected by the breaking out of war between his own country and that to which he is sent. The Porte, indeed, used, under pretence of securing the European ambassador from the effects of popular violence, but in reality in order to retain him as a hostage, to order his incarceration in the prison of the Seven Towns.

(*d*) Vide post, p. 182, and note (*n*) Sa's case.

(*e*) Klüber, s. 203. “*Sie erstreckt sich auf alles, was als Bedingung der gesandtschaftlichen Wirksamkeit zu betrachten ist: ganz vorzüglich auf Verrichtung der gesandtschaftlichen Geschäfte.*” Miruss, s. 335.

(*f*) Grotius, l. ii. c. xviii. s. ix. The Edict of the States General in 1679, which is discussed by Bynkershoek in his ninth chapter (De F. L.), is to the same effect.

(*g*) “*On regarde donc l'ouverture des lettres en temps de paix, de quelque manière. qu'elle s'exécute, comme une violation du droit des gens; mais la plus odieuse et la plus honteuse contravention à la foi publique, c'est qu'un gouvernement souffre lui-même un tel abus dans ces bureaux de poste qui ont reçu les lettres avec la taxe sous le sceau du secret.*”—De Gardien, *Traité complet de la Diplomatie*, vol. ii. p. 86, &c.

(*h*) Grot. l. ii. c. xviii. s. vi. “*Cæterum admissa legatio etiam apud tanto hostes, magis apud inimicos præsidium habet juris gentium.*”

Vattel, l. iv. c. vii. s. 83. “*Quoique le caractère du ministre ne se développe dans toute son étendue, et ne lui assure ainsi la jouissance de tous ses droits, que dans le moment où il est reconnu et admis par le souverain à qui il remet ses lettres de créance, dès qu'il est entré dans le pays où il est envoyé, et qu'il se fait connaître, il est sous la protection du droit des gens: autrement sa venue ne serait pas sûre.*” Martens, l. vii. c. v. s. 214. De Gardien, *Traité complet de Diplomatie*, vol. ii. p. 142. Merlin, v. iii. Miruss, s. 335. Heffters, ss. 204, 210. Bynk. De F. L. c. ix.

(*i*) Klüber, s. 203. Miruss, s. 336.

*CHAPTER VII. [*173]

EMBASSY—INVIOABILITY—CRIMINAL LAW.

CLIV. WE have now to consider the very grave and difficult question, whether the inviolability of the ambassador shields him from responsibility to the criminal law of the State to which he is delegated—may he, with impunity, conspire against the Sovereign (*crime d'Etat*,) or commit outrage on the lives and properties of the subject (*délit privé*?)

CLV. With respect to *criminal offences against the Private Law*, these may be of two classes: (1.) against the property, (2.) or the life of individuals. With respect to the former, the reason of the thing and the nature of the ambassador's function unquestionably demand his exemption from the criminal tribunals of the country.

The Sovereign may, according to the gravity of the offence, signify, in various ways, his displeasure, or demand his recall; but he can neither be punished nor arrested.(a)

In 1763, the Ambassador of Holland at the Court of the Landgrave of Hesse-Cassel was accused of mal-administration of a testamentary trust. The Government of Cassel called upon him to render an account, which he refused to do, whereupon he was arrested with a view to obtain from him the necessary documents connected with the trust. But the Landgrave was obliged to send a special embassy to Holland to make apology and reparation for this infraction of International Law.(b)

*CLVI. With respect to graver offences against the Criminal Law, such as murder, the question is more difficult; but the true [*174] proposition of International Law upon this subject is as laid down by Grotius, namely, that the guilty person cannot be tried by the foreign tribunals.(c) This doctrine is also supported by Wicquefort(d) Zouch(e) Bynkershoek,(f) and Vattel.(g)

Great authorities in the English law, Coke,(h) Comyns,(i) Hale,(k) Foster,(l) held a contrary doctrine; but Blackstone(m) correctly states that, whatever may have formerly been the opinion, this country follows, as others do, the opinion of Grotius.

CLVII. With respect to crimes against the majesty of the State, such as conspiracies against the Government or the Sovereign thereof, it appears to be now the clear law that no judicial process in the State, against which

(a) De Garden, vol. ii. p. 149.

(b) Ibid, pp. 149, 150.

(c) Grot. l. ii. c. xviii. 4, 5. Ward, vol. ii. pp. 515-16.

(d) "Wicquefort (Mr. Ward truly observes) composed his Treatise on Ambassadors to establish this proposition, he being at the time undergoing punishment from Holland, while minister of Luneburgh at the Hague, for betraying the secrets of Holland, in whose service he also was."

(e) Solut. Quæst. De Leg. del. Jud. Comp.

(f) De Foro Leg. c. 17, 18, 19.

(g) L. ii. s. 94, 5, 6.

(h) 4th Inst. 15-3.

(i) Dig. art. Ambassador.

(k) Pleas of the Crown, i. 99.

(l) Crown Law, 188. Vide ante, vol. i. p. 21.

(m) Comment. i. 253-4.

the offence has been committed, can be put in motion against the Representative of a Foreign Sovereign.

CLVIII. Such appears to be the best and most generally received opinion; there are not, however, wanting writers who draw a distinction between the commission of *mala prohibita* and *mala in se*, and between *privata* and *publica delicta*. But the reasons of exemption apply to both cases; namely, first, because the nature of the ambassador's functions [*175] *demands the most absolute freedom in every case that may arise, "securitas legatorum utilitati quæ ex poenâ est preponderat." (n) Secondly, because the ambassador represents the person of another, and is recognized in that capacity by the tacit compact by which he is admitted into the country; (o) it has been nobly said: "ils sont la parole du Prince qui les envoie, et cette parole doit être libre." (p)

It is not meant, however, to convey the impression, either that the ambassador is to escape without punishment, or that the State in which he is discharging his functions is powerless to resist his open violence, (q) or to stay his secret machinations against her public safety, (r) or to redress the rights of a subject whom he may have criminally injured. (s)

It is the duty and the right of the injured State, under these circumstances, to oppose force to force, and in the event of secret machinations, to secure the person of the ambassador and remove him from her borders, and in the case of the *privatum delictum*, to insist upon his being tried by the tribunals or the proper authorities of his own country. (t)

CLIX. One of the questions put to the civilians in the *case [*176] of the ambassador to Mary Queen of Scots, which has been already referred to, (u) was:—

"Whether, if an ambassador be confederate, or aider, or comforter of any traitor, knowing his treason toward that Prince, towards whom, and in whose realm he pretendeth to be ambassador, is not punishably by the Prince, in whose realm and against whom such treason is committed or confederacy for treason conspired;" and to this they answered, "We do think that an ambassador aiding and comforting any traitor in his treason toward the Prince with whom he pretendeth to be ambassador in his realm, knowing the same treason, is punishable by the same Prince against whom such treason is committed."

(n) Grot. l. ii. c. xviii. 4.

(o) Ward, vol. ii. p. 516. Grot. l. ii. c. xviii. 4, 5. Huberus, De J. C. l. iii. c. 12-22-24.

(p) Montesquieu, De l'Espr. des Lois, Pt. II. l. xxvi. c. 21.

(q) "Quod si vim armatam intentet legatus, sanè occidi poterit, non per modum poenæ sed per modum naturalis defensionis."—Grot. l. ii. c. xviii. 4, 7.

(r) "Pour ce qui est des crimes d'Etat les mesures les plus sévères à l'égard d'un envoyé, soit qu'il ait agi d'après les instructions de sa cour ou spontanément; à la vérité, il n'est pas permis, dans ce cas même, de lui faire subir une peine corporelle, mais le droit de le faire arrêter et transporter, sous escorte, hors des frontières, est réclamé sans opposition par toutes les puissances."—De Garden, Tr. de Dipl. vol. ii. pp. 150-1.

(s) "Si le délit a causé un scandale public, le Prince porte ses plaintes au souverain du ministre, demande même le rappel ou la punition du coupable, et il y a des exemples, qu'en pareille circonstance, on a interdit à l'envoyé de paraître à la cour.—Si le fait est avéré, on ne saurait refuser son rappel ou sa punition."—Ib. 150.

(t) Klüber, s. 211. Stephen's (Blackstone's) Comm. ii. p. 508.

(u) Vide ante, p. 165.

The opinion of the five civilians at first was considered as decisive against the Bishop, but he replied with firmness that he had entered England under a safe conduct, and with the full privileges of an ambassador. Lord Burleigh said that no privilege could protect an ambassador offending against the public majesty of the Prince in whose court he was resident, and that such conduct rendered him liable to a *penal action*. But the Bishop still insisted upon the privileges of an ambassador, and observed, with equal courage and truth, that they had never been violated *viâ juris sed viâ facti*, never by regular form of trial, but by violence.

He was detained for some time in prison, and then banished from the country, but the Duke of Norfolk and other conspirators were put to death.

This case has formed the text of all future discussions upon the subject of the inviolability of ambassadors. The opinion of Elizabeth's civilians has been deservedly and generally rejected, by the authority of the best writers, as well as by the practice of the most civilized States.(v)

* *Case of Mendoza, the Spanish Ambassador.*(x) [*177]

CLX. We now proceed to consider the leading cases in which the doctrine of ambassadorial inviolability has been brought under discussion. In the year 1584, not long after the opinions delivered in the Bishop of Ross's case, Mendoza, the Spanish Ambassador in England, having conspired to introduce foreign troops and dethrone the Queen,(y) it was a matter of difficulty how he should be punished. The Government, however, took the opinions of the celebrated Albericus Gentilis, then in England, and of Hottoman in France, who both asserted that an ambassador, though a conspirator, could not be put to death, but should be referred to his principal for punishment; or (according to Hottoman) sent away by force out of the country.(z) In consequence of this, Mendoza was simply ordered to depart the realm, and a commissioner sent to Spain to prefer a complaint against him.(a)

Case of L'Aubespine, French Ambassador.

CLXI. Three years afterwards, there was a conspiracy not only to dethrone the Queen, but to put her to death. The circumstances were these:—L'Aubespine, the French Ambassador, endeavoured to procure the assassination of Elizabeth. For this purpose he tampered, both by himself and secretary, with William Stafford, a man about the Court. Stafford refused to be concerned in it himself, but recommended Moody, a noted ruffian, then in Newgate, to be the instrument. With this man

(v) Bynk. De Foro Leg. c. vi.

(x) The following cases are extracted from Mr. Ward's Law of Nations, vol. ii., and the Causes Célèbes by De Martens.

(y) Camden, 296.

(z) Zouch, Solut. Quæst. 130.

(a) Camden, ub. sup.

conferences were held by Trappy and Cordalion, both of them secretaries to L'Aubespine. Stafford revealed the plot. Trappy was arrested, and both *he and Stafford confessed the whole before the Council. [*178] The ambassador was sent for, but said "he would not hear any accusation to the prejudice of the privileges of ambassadors." When Stafford was brought in, however, he assented to his knowledge of the matter, but said it was first propounded by him. Stafford, on the contrary, protested on his salvation that the first he knew of it was from the ambassador. Lord Burleigh then reproached him with the design, yet never thought of trying him. All that we can find is, that he bade him beware how he committed treason any more; that the Queen would not by punishing a bad ambassador, prejudice the good; and that he was not acquitted from the guilt of the offence, though he escaped the punishment.(b)

Case of one of the Retinue of the Duc de Sully, French Ambassador.

CLXII. In 1603, the Duc de Sully, then Marquis de Rosny, being ambassador at London, one of his retinue quarrelled at a brothel with some English, one of whom he killed. The populace rose, but were quieted by the Lord Mayor, who demanded justice. Justice, however, was not done by the magistrate, but by Sully himself, who assembled a council of Frenchmen, condemned the man to death, and not till then delivered him to the civil power. James I. pardoned him, but no attempt was made to try him by the English law, and Sully delivered him up solely for execution.(c)

[*179] **Case of Inoyosa and Colonna, Spanish Ambassadors.*

CLXIII. In the reign of King James I. of England, the Spanish Ambassadors, Inoyosa and Colonna, endeavoured to breed a disturbance in the country, by informing the King that the Duke of Buckingham meant to imprison him by means of the Parliament, and to transfer the regal authority to the Prince of Wales. Both the Court and the Parliament deemed this a scandalous libel, but knew not how to proceed with the ambassadors. Sir Robert Cotton, who was consulted, wrote a tract called "A Relation of the Proceedings against Ambassadors who had miscarried themselves," in which he asserts, that an ambassador, representing the person of a Sovereign Prince, he is by the Law of Nations exempt from Regale Tryale; that all actions of one so qualified *are made the act of his master*, until he disavow them; and that the injuries of one absolute Prince to another is *factum hostilitatis*, not treason, so much doth public conveniency prevail against a particular mischief." He then states

(b) Camden, ad an. 1587.

(c) Mém. de Sull. t. ii. pp. 191, 192. Another and a very curious question arose out of this case; the French contending that, although James might remit the execution of the man in *England*, yet, being a Frenchman, and judged by his own tribunal, he could not grant him a pardon.

various examples of ambassadors who have had violence put upon them by way of prevention, rather than punishment; none of them amounting even to a design to try them; and then recommends that some of the chief secretaries should wait upon the Ambassador of Spain, and, by way of advice, desire him to keep his house, for fear of the people; that the Prince of Wales and Duke of Buckingham should complain of the calumny in Parliament; that both Houses should, in consequence, wait upon the ambassador, to request to know the authors of it, in order to try them legally in Parliament; that if he refused, he should then be confined to his house, and a formal complaint sent against him to the King of Spain, *requiring such justice to be done upon him, as by the leagues of amity and the Law of Nations is usual*. If the King refused it would then be "*Transactio Criminis* upon himself, and an absolution of all amity, amounting to no less than war denounced."(*d*) This was *the opinion of the English Court, complaint was made to the King of Spain, and the ambassador allowed to depart, but without the usual presents.(*e*) [*180]

Case of M. de Bass, Minister from France to Cromwell.

CLXIV. In 1654, M. De Bass, Minister from France to Cromwell, was accused of a conspiracy against his life. The Council endeavoured to make him undergo examination, but he refused, saying, that although he would communicate with Cromwell personally, and prove to him that he was not privy to the design, yet he would not submit to interrogatories before a judge; for, being a public minister, he would by so doing offend against the dignity of his master, to whom alone he was accountable for his actions. The Council contented themselves with ordering him to depart the country in four-and-twenty hours.(*f*)

Case of the Ambassador of England at Constantinople.

CLXV. In 1646, the Ambassador of England at Constantinople was summoned by the merchants before the Divan to answer some complaints. The Ambassador representing his privilege, the Grand Vizier said, "*he was aware that it was a thing unheard of to summon an ambassador before the Divan, which would destroy the rights of ambassadors and the Law of Nations*." It is true, he was afterwards arrested and sent home, but that being solely owing to the revolution in England, and the arrival of a new minister, does not affect the question.(*g*)

* *Case of Gyllenburg, the Swedish Ambassador.* [*181]

CLXVI. On the 29th January, 1717, the Government of England

(*d*) Cotton's Remains.

(*e*) Wicquefort, i. 393.

(*f*) Thurloe's State Papers, vol. ii. pp. 351, 437. Wicquefort, i. 396.

(*g*) Wicquefort, i. 398.

having certain information of a conspiracy to invade the country and dethrone the King, contrived, by Gyllenburg,^(h) the Ambassador of Sweden, at that time at peace with Great Britain, they ordered the arrest of that minister, which was accordingly effected. General Wade and Colonel Blakeney, to whom the charge was intrusted, found him making up despatches, which they told him they had orders to seize; and they even insisted upon searching his cabinet, which upon the refusal of his wife to deliver the keys they actually broke open. Gyllenburg complained of these proceedings, as a direct breach of the law of nations, and some of the foreign ministers at the Court of London expressed themselves to the same effect, upon which the Secretaries of State, Methuen and Stanhope, wrote circular letters to them, to assign reasons for the arrest, which satisfied them all except Montleone, the Spanish Ambassador, who, in his answer, observed, that he was sorry *no other way* could be fallen upon for preserving the peace of the kingdom, than that of the arrest of a public minister and the seizure of his papers, which are the repositories of his secrets, two facts which seemed sensibly to wound the Law of Nations.⁽ⁱ⁾

This proceeding was, however, clearly justifiable as a measure of self-defence.

Case of the Earl of Holderness.

CLXVII. In 1744, the Earl of Holderness was sent from England [*182] as Ambassador to Venice. Passing through the *States of the Emperor of Austria, he was arrested, with his servants, by the Austrian officer in command, on the ground that England, though not at war with Austria, was an ally of her enemies, and that orders had been received to allow no Englishman to pass through that territory. The Earl at last obtained a passport, after signing an undertaking that he would submit himself to the Austrian authority if he should be declared a prisoner of war.

This proceeding was a flagrant violation of ambassadorial rights, and was so considered by Austria, who compelled the officer in command to offer an apology in person to the ambassador.^(k)

Case of M. Van Hoey.

CLXVIII. After the battle of Culloden, in 1746, the King of France, fearing that the Pretender would be taken and treated as a rebel, persuaded M. Van Hoey, the Dutch Ambassador at his Court (through whose agency certain transactions from time to time had been carried on between the belligerent Courts of London and Versailles) to write to the

(h) See a full report of this case in Martens, C. C. i. 75, under the title, "Arrestation du Baron de Görtz, ministre de Charles XII. Roi de Swède, sur la réquisition de l'Angleterre, en 1717."

(i) Tindal, (Contin. of Rapin,) b. 28. The proceedings against Gyllenburg are quoted by Bynkershoek to prove his opinion.—De For. Leg. c. xviii.

(k) De Martens, C. C. ii. App. 479.—Le Mercure, Hist. de 1744.

English Secretary of State for Foreign Affairs a letter, entreating that the life of the Pretender might be saved. This interference was greatly resented by England, and the English Ambassador in Holland obtained, in answer to his remonstrances, a severe letter of reproof from the Dutch authorities to M. Van Hoey, who wrote in consequence an apology to the English minister.^(l)

Case of Da Sa.

CLXIX. In 1653, Don Pantaleon Sa, brother to the Portuguese Ambassador in England, quarrelled with an Englishman, Colonel Gerhard, about some matter in the New Exchange; *a scuffle ensued, in which Gerhard was severely wounded. The quarrel was renewed [*183] the next day, at the same place; but this time Sa came with fifty followers, all armed to the teeth, with the deliberate intention of destroying his adversary. The result was, that many English were wounded, and one person (a Mr. Greenaway,) accidentally present, killed; that the Guards were called in, and fired upon by the Portuguese, several of whom they took to prison; the rest, with Sa, took refuge in the hotel of the Portuguese Ambassador. The ambassador was afterwards required to deliver up others of the delinquents, which he complied with, and his brother was among them. He interceded for his brother; but Cromwell resolved, if he could, to try him by the law of the land. He therefore, consulted the most eminent of the professors of the civil law, to settle how such a barbarous murder might be punished. But these disagreeing among themselves, he left the decision of the affair to a Court of Delegates, consisting of the Chief Justice and two other Judges, three Noblemen, and three Doctors of the Civil Law. Before these Sa was examined. At first he was supposed to be a colleague in the embassy, and he vaunted himself that he was the King's Ambassador, "and subject to the jurisdiction of no one else." He was made, however, to produce his credentials, by which all that could be proved was, that the King intended, in a little time, to recall his brother, and to give him a commission to manage his affairs in England. This being judged insufficient to prove him an ambassador, he was, without any farther regard to the privilege of that character, ordered, as well as all the rest, to plead to the indictment.

Such is the accurate statement of the affair till it came to a jury, as it appears from the account of Zouch, a civilian of eminence, and himself a delegate in the cause.^(m)

*It is evident, from this account of the matter, and one of more authority can hardly be met with, that had Sa been actually [*184] ambassador, instead of forming part of the suite, the proceedings against him would have been the same with those in the cases cited above. All, therefore, that can fairly be drawn from *this* precedent, as to the decision

(l) De Martens, C. C. i. 311.

(m) Vide Zouch, Solut. Quæstionis, de Leg. delinq. Jud. Compet. in præf. Sa was tried by a jury under a Commission of Oyer and Terminer.—Hale, Pleas of the Crown, i. 99.

of the then existing law of England, is, that the suite of an ambassador, if they committed murder, were liable to be tried for it by the Courts of the country. Zouch asserts expressly, that his own opinion upon the main question agreed with that of Grotius and the best authors, as to the exemption of ambassadors themselves; and it should appear, from his *Solutio Quæstionis*, that if Sa could have proved that he was an actual ambassador, his plea before the delegates would have been allowed.⁽ⁿ⁾

Conspiracy of Cellamare.

CLXX. The cases which have been hitherto cited have been those in which the representative of England has been a party. They happen to be also among the most important cases on this subject of which there is any record.

There are, however, others in which England was not concerned, and which are of importance for the principle involved in them. Such was the celebrated case of the Conspiracy of the Prince of Cellamare, at the Court of France, in 1718.

The Prince was an ambassador sent to the Court of France from the Court of Spain, by the Cardinal Alberoni, at that time Prime Minister of the latter country. The Prince, *under the direction of Alberoni, [*185] organized a conspiracy against the existing Government of France; and the fact having been ascertained by that Government, they gave orders for searching the papers of the ambassador in his presence and at his hotel. Certain of these papers they placed under the joint seal of the King of France and of the ambassador. They afterwards selected those which related to the conspiracy, some of which they published, in justification of their conduct. None of the ambassadors from the other Courts, then resident at Paris, complained of this act as an infringement of the privileges of their order, though a protest from this body has always been usual when any injury has been done to any member of it resident at the same Court.

The Prince was placed under custody until intelligence was received of the safe arrival of the French Ambassador from Madrid, whom Alberoni had intended to detain. When this intelligence arrived, the Prince was conducted, under military escort, to the frontier.

The next year war was declared between the two countries.^(o)

CLXXI. It has been held by high judicial authority, that if a foreign minister commit an assault, he is so far deprived of his privilege that battery committed on him by way of self-defence is legal, though even

(n) Ward's Law of Nations, vol. ii. p. 537, who takes his account from Lord Somers' Tracts, 10, 65, et inf.

Mr. Ward remarks, that Zouch, in the course of his work, also examines the Bishop of Ross's case, and the opinions of the English civilians upon it, so often cited, and blames those opinions in the most unequivocal terms. It is true, it ought to be observed, that he differs from Grotius in his opinion on the immunity of the suite.

See also, De Réal, Science du Gouv., i. t. v., and De Martens, C. C. ii. 490.

(o) De Martens, C. C. i. 139.

such conduct on the part of a foreign minister will not justify an arrest on process.(p)

It is clear that courts of justice cannot inquire whether a person recognized by the Government as a foreign minister was duly appointed as such or not. The recognition of the Government is conclusive upon the judicial tribunal.(q)

*Courts of law have considered that the reasons which necessitate the inviolability of the person of the foreign minister [*186] apply to those of his train or suite, and therefore, that an assault upon, and threats used towards, a Secretary of Legation, are punishable as a criminal violation of International Law.(r)

CLXXII. Hitherto the Rights of Inviolability accruing to the ambassador in the State to which he is accredited have been considered, but it must frequently happen that on his way to this State he is obliged to pass through the territory of a third State; and the question arises as to whether he is equally protected and inviolable in this territory.(s)

It is clear that the third State may refuse to allow an ambassador a passage through her territory for the same reasons that a State may refuse to receive him.

During the Middle Ages no doubt seems to have been entertained as to the strict legality of seizing the Sovereign or his representative, passing without safe conduct, previously granted through such dominions. In all the complaints made during the cruel captivity of Richard I. in Austria, by that monarch himself, by the Pope, and by other mediators, it does not appear that it was ever urged that the Duke of Austria had violated the *jus gentium*, which, so far as embassies were concerned, was certainly well understood by the Canon Law, and must have been familiar to the Pope.

As late as the year 1464, Louis XI. justified the arrest, in France, of the Ambassador from the Court of Brittany, as he was travelling to the Court of England, to which he was accredited, though at the time there was peace between Brittany and France.

Later still, during the Thirty Years' War, Richelieu arrested, in France, the Elector Palatine, and subjected him to a very close imprisonment, assigning as a reason, "the right which all nations [*187] had to arrest strangers who come into the country without a safe conduct."(t)

(p) United States v. Little, 2 Washington (American) C. C. 205. United States v. Ortega, 4 ib. 531. United States v. Benner, 1 Baldwin's Rep. (Amer.) 240.

(q) United States v. Ortega, 4 Washington (Amer.) C. C. 531. Torlade v. Barrozo, 1 Miles (Amer.) 366.

(r) Republica v. De Longchamps, 1 Dall. (Amer.) 117. Exparte Cabrera, 1 Washington (Amer.) C. C. 232.

(s) Vide ante, p. 181, case of the Earl of Holderness.

(t) In reality to prevent his treating with the army of the deceased Duke of Saxe-Weimar (the leader of a sort of army of freebooters) for the possession of Alsatia.

Ward, i. 275, n. 2, 2, 312, citing Bougeant, Hist. de la P. de Westp. l. 5, 3, 60.

The ambassadors(*u*) of Francis I. passing through Milan on their way to Venice and Constantinople, to which they were accredited, were seized and executed by the Governor of Milan, the officer of Charles V. They had, of course, no passport or safe conduct; but there was a truce subsisting between France and Spain.

Vattel condemns this atrocity, not merely as a wicked murder, which it unquestionably was, but as a scandalous breach of the International Law (*contra ela foi et le droit des gens*),(*v*) and one which therefore called for the interference of all other States.

*CLXXIII. It may be doubted whether these murders were a violation of the *jus legationis*, though—regard being had to the fact that these ambassadors were travelling through a country with which their master had a truce,(*x*) which is, while it lasts, a peace—the doubt is not very reasonable; but there can be no doubt that it was a shameful infringement of general International Law, the utmost rigour of which would only have authorized temporary incarceration upon strong suspicion.

We pass by the horrible affair of Patkul, to be shunned as a crime, and not cited as an example.(*y*)

[*188] *In 1756, the English seized, in the Hanoverian territory, upon the French Ambassador accredited to Prussia, and conveyed him to England.

In 1793, the Austrians seized, on the Lake of Chiavenna, the French Plenipotentiaries accredited to Switzerland and Naples.

CLXXIV. It has been deemed right to mention these instances of the practice of nations, but the sound rules which ought to govern this question appear to be:—

1. That, in time of peace, the ambassador is of right inviolable in his transit through a third country, but cannot claim the privileges of extritoriality as a matter of tacit compact, though they would probably be accorded to him by the courts of all nations—and to ambassadors to a Congress they are accorded. The diplomatic agents of foreign powers at Frankfort-on-the-Maine are allowed the same privileges,*on their transit, as the members of the German Confederation.(*z*)

(*u*) Wicquefort, l. 1, s. 19, p. 433. Vattel, l. xiv. c. vii. s. 84.

(*v*) The distinction which Wicquefort would establish between the two is wholly inadmissible. What he should have said was, that the offence was not, under the circumstances, "*contra jus legationis*." This point is well put in the *Traité complet de la Dipl.* s. 213.

(*x*) It is strange that Vattel omits this circumstance.

(*y*) De Martens, *Causes Célèbres*, t. ii. App. 467.

(*z*) Grotius says, l. ii. c. xviii. 5, 1: "Non pertinet ergo hæc lex ad eos per quorum fines, non acceptâ veniâ, transeunt legati, nam siquidem ad hostes eorum eunt, aut ab hostibus veniunt, aut alioqui hostilia moluntur, *interfici etiam poterunt* . . . multoque magis *vinciri*." It is, however, impossible to defend the former proposition, and it is certainly not a principle of the existing International Law.

Vattel, l. iv. c. vii. s. 84. "Les autres, sur les terres de qui il passe, ne peuvent lui refuser les égards que mérite le ministre d'un souverain, et que les nations se doivent réciproquement; ils lui doivent surtout une entière sûreté."

Merlin, *ib.* s. iv. s. v. Art. 12.

Wheaton, i. 269. "He is entitled to respect and protection, though not invested with all the privileges and immunities which he enjoys within the dominions of the sovereign to whom he is sent." Miruss, s. 365. Bynkershoek, De F. L. c. ix.

2. That, in time of war, he cannot be secure from imprisonment without a previously obtained permission to pass through the territory; but that his life can in no case be taken, unless, *indeed, he actually exercises hostilities in the country through which he [*189] passes.

CLXXV. It is a melancholy reflection, that the opinion of Cicero should be in advance of modern and Christian civilization on this point: "Legatorum jus divino humanoque vallatum præsidio, cujus tam sanctum et venerabile nomen esse debet, ut non solum inter sociorum jura, sed etiam et hostium tela, incolume versatur."(a)

The true International rule would be, that the ambassador should be allowed, in all cases, the *jus transitus innoxii*. This, though(b) Bynkershoek endeavours to misunderstand it, was clearly the law of Holland at the beginning of the eighteenth century. The Mexicans are said to have adopted a similar principle of law; their practice was to mark out a certain route, out of which it was not lawful for the hostile ambassador to deviate.

It is well remarked by Zouch, that both the State which sends the ambassador, and that to which he is sent, are injured by harm or insult inflicted upon him by a third country.(c)

*CHAPTER VIII.

[*190]

EMBASSY—EXTRITORIALITY—CIVIL JURISDICTION.

CLXXVI. WE have now to consider the exemption of the ambassador from the jurisdiction of the *civil tribunals* of the country to which he is accredited. With respect to this subject, the privileges of Extritoriality have been established by the universal consent and custom of all civilized nations, in order to secure the sanctity of the ambassador: they have been thrown up, from time to time, as outworks to the citadel.

The presumption of law, both from the length of the usage and the reason of the thing (*testata et præsumpta mens gentium*), is so strong, that, unless due notification of the intention to depart from the established custom had been given, the ambassador would unquestionably be entitled to demand the enjoyment of the extritorial privileges ordinarily incident to his station.

Klüber, s. 176. "Persönliche Sicherheit ist das *mindeste* worauf alsdann der Gesandte Anspruch zu machen hat."

(a) In Verrem, iii.

(b) Ib. Cf. Merlin, *Ministre Public*, s. v. Art. 12.

Bynkershoek, indeed, admits it at first: "Benigna ordinum erga legatos voluntas; vulgo alioquin dici solet, jus legationis non valere nisi inter utrumque principem, qui mittit legatos et ad quem missi sunt, cætera privatos esse."—C. ix.

(c) De *Judicio inter Gentes*, p. 2, s. 4, s. 18.

Felix, *Droit Int. Priv.* p. 279, contains the enactments in various municipal codes respecting the treatment and protection of ambassadors.

OCTOBER, 1855.—10

If in an evil hour, for its own welfare, such due notification had been given by any State, and nevertheless, an ambassador, which is a most improbable hypothesis, had been accredited to it, he would not be entitled to claim, as matters *stricti juris*, those privileges the denial of which had formed the subject of the notification.

CLXXVII. This proposition, however, must be qualified by two important reservations :—

1. It is not competent to a State, by any notification, under the pretext of curtailing extritorial privileges, to deprive an ambassador of those privileges which are essential to secure performance of his functions, such, for instance, as appertains to the inviolability of his person.

2. A State so narrow-minded and ill-advised as to refuse the customary [*191] extritorial privileges to the representative of *another State, must take care to act in this matter, impartially, towards all nations. The nation unfavourably distinguished from others by conduct involving a departure from long usage of the civilized world, and, in a manner, affecting its honour, would be entitled to consider such unfavourable distinction as a just cause of war.

It is, indeed, not to be imagined for an instant that any other nation would accept this invidious distinction. She would know that, however nominally in her favour, it was really to her detriment, as a member of that community, a part of which cannot be injured without endangering the welfare of the whole.

CLXXVIII. Nevertheless, the exemption of the ambassador, his family, and suite, from the jurisdiction of the civil, as well as the criminal tribunals of the country in which he was resident, is not absolutely necessary for the preservation of the inviolability of the ambassador. “*Persona*,” Bynkershoek truly remarks, (a) “*quantumvis sancta, solâ in jure vocatione non violatur*.” The Roman Law rightly defined violence, when it said, “*vis est et tunc, quotiens quis, id, quod deberi sibi putat, non per judicem reposit*.” (b) The Priests, the Vestal Virgins, the Tribunes of the People, were sacred and inviolable: but they were amenable to the Civil Courts of law. The Pontifex was exempt, but only while he was employed in the performance of his holy functions. The ambassador was not, by the reason of the thing, (c) therefore exempt from the jurisdiction of the Civil Courts, which might be so exercised as not to infringe on his inviolability.

CLXXIX. When it had become a custom of universal observance among nations (*placuisse gentibus ut communis mos*) (d) that the ambassadorial representative should be considered **fictione quâdam*, in the [*192] presence itself of the august Principal, the advance was not difficult to another usage, which “*fictione simili*,” considered the representative as being “*quasi extra territorium*.”

He was a foreigner, and therefore, according to Bynkershoek (e) and

(a) Bynk. De F. L., c. v.

(b) Dig. l. iv. t. 2, s. 12. “*Cæsar dixit: tu vim putas esse solum si homines vulnerentur? vis est,*” &c.

(c) Bynk. De F. L., c. vii. c. viii.

(d) Grotius, ib., iv. 5.

(e) De F. L., c. v. c. viii.

other eminent civilians, not amenable to the civil tribunal, except by arrest; and, as an ambassador, he was exempt from arrest. He therefore remained the subject of the power which commissioned him; his domicile was unchanged.

CLXXX. It was a further extension of the fiction of Exterritoriality to render the ambassador's personal property exempt from arrest; this was little more than an application to ambassadors of the rule generally adopted by nations with respect to private foreigners, that their personal effects were considered, as much as their persons, to belong to their domicile.

It has not yet been, and probably never will be, extended to real property, if an ambassador should happen to possess any in the country of his mission. The territorial possession is in no way attached to the character of the ambassador. The fiction of Exterritoriality cannot be applied to immoveable possessions, and there is no doubt that they, with their incidents, remain subject to the jurisdiction (*forum reale*) of the country in which they are situate.^(f) The only question, in [*193] *such a case, would be the proper way of serving the ambassador with notice of such an action. It has been said that, technically speaking, notice ought to be served upon his domicile, i. e., his residence in his own country; but Bynkershoek^(g) justly observes, that a letter is at once the most courteous and most effectual way of apprising him of his interest in the legal proceedings.

From this rule with regard to real property, is to be exempted the actual dwelling-house of the ambassador,^(h) which is intimately connected with his personal inviolability.

CLXXXI. There are some exceptions, moreover, to the privilege respecting personal property, viz. :

1. When the ambassador becomes a trader or a merchant in the country to which he is sent, the property embarked by him, or accruing to him, in this capacity, is liable to seizure and condemnation, at the instance of creditors, in the same manner as the property of any other trader or merchant.⁽ⁱ⁾

(f) Vattel, l. iv. c. viii. s. 114, 115. Miruss, s. 343.

Bynk. De F. L., c. xvi. : "In rem actione legatos conveniri posse, ubi degunt, ubique receptum esse, et neminem, qui vel prolixè legatos defendit, contradicere . . . idque ideo, quia res ipsa convenitur, neque aliter legatus quam possessor rei, cujus possessio cum probanda sit (l. 9, ff. de Rei vindic.) vix aliter probari poterit, quam ubi res est. Et hoc quidem in fundo, qui vindicatur, dubium non est, contra quam in re, legationis causâ huc transducta, vel emptâ, equo forte," &c.

"Si cet envoyé possède des biens fonds dans ce pays, il y est justiciable des tribunaux pour toutes les affaires qui concernent ses propriétés, suivant la compétence qu'établit le droit civil."—De Garden, Traité complet, l. ii. 144.

(g) De F. L., c. xvi. "Igitor demus hoc legato, ut ejus honori, quam fieri potest maxime, consulatur, ut et hunc recta in jus vocemus per epistolam, non per ambages, mittendam ad locum pristinæ habitationis, sed ubi nunc est," &c.

(h) Vattel, l. iv. c. viii. s. 115. Wheaton, i. p. 279. Bynk. D. F. L., c. xiv. De Legato Mercatore.

lb. c. xvi. "Quibus ex causis legatus possit conveniri in loco, ubi legatione fungitur, et quemadmodum tunc faciendâ sit judicii denunciatio." Vattel, l. iv. c. viii. s. 114. Merlin, ib. s. v., Art. vi., vii. Martens, s. 217. Wheaton, i. p. 279. Klüber, s. 210.

(i) Vide post. Taylor v. Best and another, January 31, 1854. Queen's Bench.

There may sometimes be difficulty in deciding whether the property belong to him in the capacity of ambassador or merchant, and in all cases of reasonable doubt, the ambassador should be allowed the benefit of it. The law was correctly laid down on this subject of the merchant-ambassador by the Dutch Tribunal, in 1720-1, when the *Envoy Extraordinary [*194] of the Duke of Holstein was sued by his creditors for mercantile debts contracted by him; and the Courts at the Hague granted a decree of arrest and citation against him. The arrest was to operate on all goods, money, and effects within the jurisdiction of the tribunal, with the exception of the moveables, equipages, and other things belonging to him in his character of ambassador.

By "money" (*Penningen—deniers—pecunia numerata*,) Bynkershoek says the Court clearly intended to include only money embarked in the particular mercantile speculations; and he adds, that as it must be always difficult to distinguish this money from that which belongs to the ambassador for other purposes, it would be wiser and fairer to omit money, and include it among the things necessarily appertaining to the office of legation. (*k*)

This instance is memorable, not merely on account of the correct enunciation of the law to which it gave rise, but also because it furnished Bynkershoek with the occasion of writing his excellent treatise "*De Foro Legatorum*."

CLXXXII. In truth, every State ought, by expressly forbidding their ambassadors to combine engagements in private trade or commerce with the sacred duty of representation, to prevent any question of the kind from ever arising. The Roman law on this point deserves to be imitated: "*Enim qui legatione fungitur, neque alienis neque propriis negotiis se interponere debeat*." (*l*)

It would, however, be perhaps difficult and harsh to prevent the ambassador from acting in the fiduciary character of trustee or testamentary executor; any property accruing to him in these capacities is not within the shelter of extraterritorial privilege.

*CLXXXIII. 2. Another exception is furnished by the case [*195] of the ambassador who becomes voluntarily a plaintiff in a cause, which act implies the consent of his master. The plaintiff-ambassador makes himself liable to the counter-demands (*reconvenciones*), which are a mode of defence, and to condemnation in costs, if the suit fail. (*m*)

The Roman law says justly, "*Qui non cogitur in aliquo loco judicium pati si ipse ibi agit, cogitur excipere actiones et ad eundem judicem mitti*." (*n*)

(*k*) Ibid. c. xvi. "*Fortasse æquius melius erit, quia in causâ dubiâ, ut hæc est, pro legato solemus respondere, omnem pecuniam arresto eximere, et hanc referre inter res ad obeundam legationem cum maximè necessarias*."

Ibid. c. xiv. "*Et mihi hujus libelli scribendi occasionem præbuit*."

(*l*) Dig. De Legationibus, l. 50, t. vii. 8.

(*m*) Bynk. ib. xvi. Merlin, ib. v. Art. x.

(*n*) Dig. l. v. t. i. 22. "*De judiciis et ubi quisque agere vel conveniri debeat*."

Bynk. ib. xvi. "*Alia etiam sunt, etiamsi legatos non subditos dicamus, in quibus forum nostrum non rectè subterfugerint, quin et in quibus potestas quædam in eos exerceri poterit, sed ejusmodi potestas, quæ nostros cives magis defendat,*

On the other hand, if the suit succeed, and the defendant prosecute an appeal, which is also a mode of defence, the plaintiff-ambassador cannot decline the jurisdiction of the Superior Court.

CLXXXIV. 3. There is also a kind of defensive jurisdiction, so to speak, which may be exercised over ambassadors as over other foreigners—a jurisdiction which has for its object to prevent the ambassador from doing some civil injury, namely, the jurisdiction of interdict, according to the Roman, and of injunction, according to the English law; such (*een Mandament van Complainte an een Mandament van Sauvegarde*) appears to have been exercised by the Dutch tribunal, in 1644, against the Swedish Ambassador.

CLXXXV. So Albericus Gentilis and Bynkershoek(o) are both of opinion, that the ambassador might, on account of the dangerous condition of his house, or for other causes threatening his neighbour with injury, be subject to that class *of actions(p) familiar to the Roman Law, through which the Prætor administered an immediate temporary remedy against an impending wrong. It is clear that the Provincial Legates of Rome were not exempt from this kind of jurisdiction;(q) and both the authorities above mentioned conceive that the reason of the thing renders the principle of that law applicable in this particular to modern ambassadors.(r)

CLXXXVI. With these exceptions, all civilized nations unanimously accord to ambassadors complete exemption from the civil jurisdiction of the country in which they reside.

These extraterritorial privileges are also extended, by positive International Law, as much as the rights of inviolability, to the family, and especially to the wife of the ambassador. She is entitled to ceremonial honours, according to the usage of courts, and any affront offered to her is a special indignity to the ambassador: the same remark applies to his family. It is not competent to any member of the family to waive this privilege.(s) His suit or train (*comites*) are also entitled to these privi-

quam legatos cogat. Multis aucti sunt privilegiis, ut ipsi commodius degant, nec quicquam turbentur in obeunda legatione, non ut, vi illatâ, alios turbent, et res eorum auferant. Quod si fiat, fortasse rectè utemur iis actionibus, quæ *interdictum* naturam magis sapiunt, quam jussionum, &c.

(o) Ibid.

(p) Dig. l. 39, t. 1. "De operis novi nunciacione."

Ib. t. 2. "De damno infecto et de suggrundiis et protectionibus."

Ib. t. 3. "De aquâ et aquæ pluvîæ arcendæ."

(q) Dig. l. v. t. 1, 28. "Ædium nomine legatus damni infecti promittere debet aut vicinum admittere in possessionem."

(r) "Explorata ratio facit jus istud ab *majoribus* legatis commune."—Alb. Gent. c. xvi. *De contractibus legatorum*.

Vattel, l. iv. c. ix. 121. "L'épouse de l'ambassadeur lui est intimement unie, et lui appartient plus particulièrement que toute autre personne de sa maison. Aussi participe-t-elle à son indépendance et à son inviolabilité. On lui rend même des honneurs distingués, et qui ne pourraient lui être refusés, à un certain point, sans faire affront à l'ambassadeur."

(s) Gazette des Trib. No. 4982, 21 Août, 1841. Case of La Baronne de Pappenheim. Grotius, ib. iv. s. 3. Wicquefort, i. s. 28.

Bynk. ib. c. xv. *De comitibus legatorum*. "Ex consuetudine, quæ nunc vicit inter gentes, veri legati (non provinciales et municipales quales ferè Romæ) domum revocant, tam in contractibus quam delictis. *Igitur* in utrisque etiam domum revocabunt comites, sive majores, sive minores, nam et lixæ, scoparii, stabularii

[*197] leges, a violation of which in their persons affects *the honour, though in a less degree, of their chief. In this suite, couriers employed in carrying despatches are of course included.

CLXXXVII. As the privilege is accorded to the suite on account of the ambassador, and not on account of his Sovereign, it may be waived by the former; and it was waived by the ambassadors at the Congresses of Münster and Niméguen.^(t) But it cannot be waived in the case of any subordinate officer of his household appointed by the Sovereign himself.

CLXXXVIII. The Secretary of Legation being so appointed, is especially, and of his own right, entitled to these privileges,^(u) and to a certain rank, his appointment being notified to the Minister of Foreign Affairs. The Secretary to the Embassy, though unfavourably distinguished from the other in these particulars, has been usually considered as an official person distinct from the general suite.^(x) Difficulties have arisen from persons, perhaps subjects of the State from which the embassy is sent, claiming, without sufficient warranty, to belong to it. It has therefore been enacted by the municipal laws of some countries, and it ought to be the usage of all, to require a list of the persons composing the suite to be delivered to the Minister for Foreign Affairs, or other proper officer.^(y)

[*198] *CLXXXIX. In England it has been already observed, that especial provision has been made concerning the arrest of foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the Statute 7th Anne, c. 12, which makes any process against them, or their goods and chattels, altogether void; and provides, that the persons prosecuting, soliciting or executing such process, shall be deemed violators of the Law of Nations, and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit. But no trader within the description of the Bankrupt Laws, who shall be in the service of any ambassador, or public minister, is to be privileged or protected by this Act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered in the office of one of the principal Secretaries of State, and by him transmitted to the Sheriffs of London and Middlesex, or their undersheriffs or deputies.^(z)

This Act itself was, as Lord Chief Justice Abbott remarked, "only

sequuntur forum legati, ut quicumque famulus sequitur forum heri sui." According to the Roman Law, the domestics of the legatus were justiciable at Rome, as he was. Vattel, l. iv. c. ix. s. 120. Wheaton, i. p. 277.

(t) Wicquefort, i. s. 28, pp. 423-4.

(u) *Ex parte Cabrera*, 1 Washington's C. C. (American) Reports, 232. *Respublica v. De Longchamps*, 1 Dallas (American) Reports; vide ante, p. 117.

(x) *Traité complet, &c.*, ii. p. 21. When attached to Papal legations they are styled *auditeurs de nonciature*. Wheaton, ib. Vattel, ib.

(y) Wheaton, ib.

Bynk. ib. "*Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum, sed pessimo exemplo id nunc ubique gentium negligitur.*"

(z) Russell on Crime, (ed. Greaves, 1843,) vol. i. p. 754.

declaratory and in confirmation of the Common Law. It must, therefore, be construed according to the Common Law, of which the Law of Nations must be deemed a part.”(a)

CXC. There have been various decisions on the subject of this Statute. It has been held to be insufficient to claim the discharge of a defendant, as being servant to the Minister of the Prince, Bishop of Liege; and that it was necessary to learn in what manner the Minister was accredited.(b) “Certainly,” said Lord Mansfield, in this case, “he was not ambassador, which is the first rank. Envoy, indeed, is a second class; but he is not shown to be even an envoy; he was called minister, it is true, but minister alone is an equivocal *term.” And Lord Mansfield also said, that the Law of Nations does not take in [*199] consuls(c) or agents of commerce, although received as such by the Courts at which they are employed; and this case was expressly determined in an elaborate judgment in the very recent case of *Viveash v. Becker*.(d)

The servant need not lie in the house, although he must do some service there.(e) He must be a real, not a nominal servant.(f) Many cases arose upon claims of privilege by persons as servants of the Count Haslang, the Bavarian Ambassador, of whom it was said that, although a minister of a very humble rank, he had more domestics registered than the ambassadors of the most potent powers in Europe.

In the case of *Masters v. Manby*,(g) application was made to the Court for the discharge of the defendant, as being the ambassador’s messenger, and it was sworn that he sometimes executed service as such. The defendant was a land-waiter at the Custom House, and the Court were of opinion, that he could never be deemed a *bona fide* domestic. In *Triquet v. Bath*,(h) the privilege was allowed to the defendant, as English secretary of the ambassador, the defendant’s affidavits being so framed, that everything was sworn that in absolute strictness could be required, to bring him within the description of a domestic servant; and the Court held that it was sufficient if an actual *bona fide* service were proved; and that if such a service were proved, they must not, upon bare suspicion, suppose it to have been merely colourable and collusive.

In *Lockwood v. Coysgarne*,(i) the claim of privilege was disallowed to the defendant as the ambassador’s physician, as not being a case of *bona fide* service; and the Court said, it *would be of very bad consequence if protections should be set up for sale, or made use of [*200] merely for the sake of screening people from their just debts. In *Darling v. Atkins*,(k) the privilege was disallowed to the ambassador’s English secretary, he being purser of a man-of-war, which was held to be an

(a) *Novello v. Toogood*, 1 Barnwell & Cresswell’s Rep. 562, A. D. 1823.

(b) *Heathfield v. Chilton*, 4 Burrows, 2015.

(c) Vide post, Chapter on CONSULS, in which these decisions are further mentioned.

(d) 3 Maule & Selwyn, 284.

(e) *Evans v. Higgs*, Strange, 797. *Widinore v. Alvarez*, cited *ibid*.

(f) *Crosse v. Talbot*, 8 Modern Reports, Case 200, (tempore Geo. I.)

(g) 1 Burrows, 401.

(h) 3 Burrows, 1478.

(i) 3 Burrows, 1676.

(k) 3 Wilson’s Reports, 33.

office incompatible with the situation of secretary to the ambassador. In this case it was observed, that the ambassador's secretary is privileged, the Statute being only explanatory of the Law of Nations, and the words "domestic" and "domestic servant" are only by way of example. ^(l) "The Statute only requires the names of the persons privileged to be registered, for the purpose of proceeding against the parties criminally, for a violation of the Act, and not for the purpose of exemption from arrest." ^(m)

In a very recent case it was decided, that though a foreign minister does not lose his privilege of exemption of suit by trading in this country, his domestic servants do, under the limitation contained in the Statute on which we have been commenting. ⁽ⁿ⁾

CXCI. In 1772, the Baron de Wrech, Minister Plenipotentiary of the Landgrave of Hesse-Cassel at the Court of Paris, was recalled from his embassy. He was about to quit Paris without paying the debts which he had contracted there. His creditors, especially a Marquis de Bezons, besought the Minister for Foreign Affairs not to grant the Baron his passport. It was accordingly refused. All the *corps diplomatique* at Paris remonstrated against this act as a violation of International Law.

The French Minister, le Duc d'Aiguillon, replied in an elaborate memoir, drawn up by M. Pfeffel, upon the Rights of Ambassadors; defended, upon the authority of Grotius and Bynkershoek, the right of [*201] using that species of constraint *against an ambassador, which did not interfere with the exercise of his functions. He further appealed to the practice of other States, as warranting the step which had been taken, and especially to that of Hesse-Cassel itself, which had imprisoned a Dutch ambassador, in order to compel him to render an account of a charitable institution, of which he had been the administrator. It was admitted that this attack on the person of an ambassador was indefensible, but it was added that Holland had not denied the jurisdiction of Hesse-Cassel in the matter.

The Landgrave was compelled to make an arrangement with the creditors of the Baron de Wrech, before that minister could obtain his passport. ^(o)

If this had been a proceeding between the States of Hesse-Cassel and Holland, on the principle of reciprocity of practice, it might have been justified, but, under the circumstances, it was a direct infringement upon the general principles of International Law.

CXCII. The Courts of Justice in England have adhered to the proper rule of law upon this subject. Any apparent exceptions will be found to range themselves under that class of cases, in which the ambassador has either been a plaintiff in a suit, or engaged as a merchant or trader in the commerce of the country to which he has been delegated.

In the year 1694, a case in the High Court of Chancery, intituled

(l) Hopkins v. De Robeck, 3 Durnford & East's Reports.

(m) Ibid.

(n) Vide post, Taylor v. Best, Drouet and Sperling, Law Journal Reports, vol. xxiii. part 5, N. S., p. 93.

(o) Causes Célèbres du Droit des Gens, par De Martens, t. ii. p. 110.

Pilkington v. Stanhope, (*p*) was decided as follows:—"The plaintiff having brought a bill, to redeem an old mortgage, against the defendant, who was then an Ambassador at the Court of Spain, the defendant obtained an order that all proceedings should cease until his return from his embassy. The plaintiff moved to discharge the order; and upon debate it was agreed a protection lies for an ambassador, *quia profecturus*, or *quia moraturus*, and may at law cast an essoin *for a year and a day, and may afterwards renew it, if the occasion continues." [*202]

The Court ordered a stay of proceedings for a year and a day from this time, unless the defendant should sooner return into England.

CXCIII. In 1854, an action (*q*) was brought in the Court of Common Pleas against the Secretary of Legation of the King of the Belgians, a Monsieur Drouet, as well as other Directors of a Society formed in Belgium and London for working the Royal Nassau Sulphate of Barytes Mines. The action was to recover deposits paid by the plaintiff on shares in the above-mentioned society. Before the writ issued, in June, 1853, M. Drouet, who was Secretary of Legation of the King of the Belgians, instructed his attorney to write to the attorney for the plaintiff, to ask if a writ was to be issued, and if it was, to direct that it should be sent to him; and after the writ was issued, M. Drouet directed his attorney to enter an appearance, which he did accordingly. M. Drouet was abroad from June till the beginning of December, on the duties of his office, and in the meantime the action proceeded. M. Drouet pleaded the general issue by his attorney. Notice of trial was given for the 20th of December, and a special jury was obtained on the application of M. Drouet. On M. Drouet's return to England, in December, his attorney took out a summons to stay all proceedings, or to strike out his name from the proceedings in the action, on the ground of his privilege as a public minister. The summons was heard before Talfourd, J., who ordered proceedings to be stayed till the fifth day of next term. . . .

Lord Chief Justice Jervis said:—"There is no doubt that the defendant, M. Drouet, fills the office of a public minister, such as the privilege contended for will attach to; and I think it equally clear that, if the privilege do attach, as it undoubtedly does attach to the character of minister, it is *not, in the case of a minister, interfered with or abandoned by the circumstance of trading, as it would be if the claim were set up in respect of the privileges of a servant of the ambassador, under the Statute of Anne. (*r*) If an ambassador or minister violate the character in which he is delegated to this country, by entering into commercial transactions, that raises a question between the country to which he is sent and the country from which he is sent; but he does not thereby lose any privilege to which he may be entitled, the privilege being a general privilege, and the limitation attached to the privilege, by reason of trading, being confined by the Statute of Anne to the case of

(*p*) *Vernon's Cases*, vol. ii. p. 317.

(*q*) *Taylor v. Best, Drouet & Sperling*, *Law Journal Reports*, vol. xxiii. p. 89, (Common Pleas.)

(*r*) *Vide post*.

servants of the ambassador, who may lose the privilege.
 Admitting, therefore, that the applicant in this case is a person entitled to the general privilege, which he has not lost by any trading transactions into which he may have entered; if such be established to the satisfaction of the Court, the question is whether he is entitled, under all the circumstances of the case, to the privilege which he now claims. Now, although it is admitted, that no process against person or goods can be available against the person or goods of an ambassador or minister, no case has been cited to show that an application like this, to stay all the proceedings in an action against such a person, is available in the Courts of this country. On the contrary, it appears, on examination, that in the case of servants, and the same principle must apply with reference to ministers, the practice has been not to stay all proceedings, but to relieve the person of the servant from the vexation of service of process, or of bail; and the applications have hitherto been, as far as I can understand them, where the party has been arrested, to discharge him from the arrest on entering a common appearance.

It is contended, and perhaps it is doubted, that an ambassador or minister has a privilege from suit, or, at all events, from such suits as [*204] ultimately result in the taking of his *person, or of his goods necessary for his state or comfort; and that he cannot be compelled, *in invitum* or involuntarily, to enter into litigation in a country in which he is resident; but it is admitted by all the foreign jurists, that where suits can be founded without attacking the personal liberty or comfort, or interfering with the personal privileges of the individual, they may proceed."

Mr. Justice Maule said: "I think, on the ground that M. Drouet has appeared in this action, and allowed it to go through certain stages, this application ought to fail. It is a grave question whether an ambassador, or public minister, which M. Drouet undoubtedly is, is so far protected as not to be liable in any manner, supposing him to object to the jurisdiction. That question is not decided by any legal determination in this country, nor, as far as judicial determinations go, do we find it so determined elsewhere. With respect to mere cases in which a special application was made under the 5th section of the Statute of Anne, they were cases in which servants of ambassadors, who had been sued and arrested, were discharged on common bail. Now, there is a great distinction between an ambassador and the domestic servant of an ambassador. The ambassador has a privilege; and the privilege of his domestic servant is not the privilege of the servant himself, but of the ambassador, and is based on the ground that the arrest of the domestic servant might interfere with the comfort or state of the ambassador. Where these are not interfered with at all, the ambassador is not interfered with by the suit; and the servant has no privilege except that which arises from the privilege of the ambassador. It is an important point, and one fit to be very gravely considered when it fairly arises, whether an ambassador is liable to be sued by process not affecting his person or his goods; whether by such a process he can be brought, unwillingly, into the Courts of this country, and have his rights determined on, perhaps even so as

to interfere with his comfort. A man could not stand by and without care allow a suit to be *determined on which the decision would be binding upon him; and, therefore, it may well be questioned [*205] whether the privilege of the ambassador is not as extensive as the text of Blackstone(s) alleges it to be."

CXCIV. In some countries the immunity of the ambassador has not been left to rest upon the general recognition of International Law by the Municipal Law, but has been made the subject of express enactment.

In England, Blackstone observes(t) that so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it previous to the reign of Queen Anne, when an ambassador from Peter the Great, Czar of Muscovy, was actually arrested and taken out of his coach, in London,(u) for a debt of 50*l.*, which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the Queen. The persons who were concerned in the arrest were examined before the Privy Council, of which the Lord Chief Justice Holt was at the same time sworn a member,(x) and seventeen were committed to prison,(y) most of whom were prosecuted by information in the Court of Queen's Bench, at the suit of the Attorney-General,(z) and at their trial before the Lord Chief Justice were convicted of the facts by the jury;(a) reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined. In the meantime, the Czar resented this affront very highly, and demanded that the Sheriff of Middlesex, and all others concerned in the arrest, should be punished *with instant death.(b) But the Queen [*206] directed her Secretary to inform him, "that she could inflict no punishment upon any the meanest of her subjects, unless warranted by the law of the land; and therefore was persuaded that he would not insist upon impossibilities."(c) To satisfy, however, the clamours of the foreign ministers (who made it a common cause,) as well as to appease the wrath of Peter, a bill was brought into Parliament,(d) and afterwards passed into a law,(e) to prevent and punish such outrageous insolence for the future. And with a copy of this Act elegantly engrossed and illuminated, accompanied by a letter from the Queen, an Ambassador Extraordinary(f) was commissioned to appear at Moscow,(g) who declared, "that though her Majesty could not inflict such a punishment as was required, because of the defect in that particular, of the former established constitutions of her kingdom, yet, with the unanimous consent of the Parliament, she had caused a new Act to be passed, to serve

(s) Vide post.

(t) Stephen's (Blackstone's) Comm. ii. pp. 510-12.

(u) July 21, 1708; Boyer's Annals of Queen Anne.

(x) July 25, 1708; *ibid.*

(y) July 25 & 29, 1708; *ibid.*

(z) October 23, 1708; *ibid.*

(a) February 14, 1708; *ibid.*

(b) September 17, 1708; *ibid.*

(c) January 11, 1708; *ibid.*; Mod. Un. Hist. xxxv. 454.

(d) Com. Journ. December 23, 1708.

(e) April 21, 1709; Boyer, *ibid.*

(f) Mr. Whitworth.

(g) January 8, 1709; Boyer, *ibid.*

as a law for the future." This humiliating step was accepted as a full satisfaction by the Czar; and the offenders, at his request were discharged from all further prosecution.^(h)

CXCV. The North American United States passed a statute (April 30, 1790,) containing provisions similar to those of the statute of Anne, which has just been mentioned, and the decisions of the tribunals of the United States have been pretty much in accordance with those of the courts of justice in England.⁽ⁱ⁾

[*207] *CXCVI. In France^(k) before 1789, the ambassadorial privileges were not sanctioned by any law, but rested on the recognition of usage. In that year the Constituent Assembly, in answer to an address presented to them by the *corps diplomatique*, declared the inviolability of these immunities. In 1794, (3rd March,) the National Convention decreed that all questions relating to these immunities should be referred to the Committee of Public Safety. At the present time all complaints upon this subject are addressed to the Minister for Foreign Affairs. In the *projet* of the *Code Civil*, there followed upon the third article an exceptional provision, in these words:—"Les étrangers revêtus d'un caractère représentatif de leur nation, en qualité d'ambassadeurs, de ministres, d'envoyés, ou sous quelque autre dénomination que ce soit, ne seront point traduits, ni en matière civile, ni en matière criminelle, devant les tribunaux de France. Il en sera de même des étrangers qui composent leur famille ou qui seront de leur suite." But this article was rejected by the *Conseil d'Etat*, upon a suggestion of the elder Portalis, that "ce qui regarde les ambassadeurs appartient au droit des gens; nous n'avons point à nous en occuper dans une loi qui n'est que de régime intérieur."^(l) Therefore, the 14th article of the Code only provides for obligations contracted between a French subject and an individual foreigner; nevertheless the provision in the *projet* is considered by the legal authorities in France as, by usage at least, a part of the law of the land.

CXCVII. Spain possesses various laws upon this subject; one relative to the immunity of ambassadors from taxes, another relative to their debts, by which it should seem that proceedings may be taken before the Spanish tribunals against ambassadors for debts contracted during the time of *their mission, but not on account of antecedent obligations, a municipal regulation which is inconsistent with the principles of International Law upon this subject. Another law suppresses the right of asylum in the hotel, and another provides that only natives may represent the kingdom of Spain at Foreign Courts.^(m)

(h) Vide post, decisions on cases arising under this Statute.

(i) See cases mentioned in note to section 172.

See also *United States v. Hand*, 2 Washington's (American) C. C. Rep. 435.

Dupont v. Pichon, 4 Dallas (American) Rep. 321.

(k) Fælix, l. ii. t. ii. c. ii. s. 219.

(l) Fælix, *ibid.*; Loaré, *Législation Civile*, t. i. p. 580, n° 11; t. ii. p. 45, n° 21; le même, *Esprit du Code Napoléon*, t. i. p. 210. Répertoire, v° *Ministre Public*, s. 5, s. 4, art. 3, (4^e édit., t. viii. p. 291.)

(m) Fælix, l. ii. t. ii. c. ii. s. 220.

Recopilacion de Leyes, l. ix. t. 31, l. 4. Martens, C. C. t. ii. pp. 353, 356, 361, 362 et 364.

CXCVIII. Portugal has a law of John IV.,⁽ⁿ⁾ renewed under John V., to the same effect as that of Spain, with respect to the debts and contracts of the ambassador.

CXCIX. Russia has enacted that all disputes against any member of the Embassy must be transmitted to the Minister for Foreign Affairs, and that no judgment can be put in force without the precincts of the hotel, except through the intervention of that minister; all persons attached to the Embassy and all foreign couriers are exempt from the obligation of being furnished with a Russian passport, and from being inspected by the custom-house officers.

All members of the *corps diplomatique* are allowed to introduce their moveables duty free, and to receive those which may be addressed to them during the first year of their residence in Russia upon the same terms.^(o)

CC. With respect to the German Powers, Austria has enacted that all persons belonging to the Embassy shall enjoy the privileges conferred upon them by the principles of International Law and Public Treaties.^(p)

*The Bavarian Code provides that all persons enjoying ambassadorial rights are exempt from the ordinary jurisdiction of [*209] the tribunals of the country.^(q)

The Prussian Code enacts that all persons belonging to the embassy shall be entitled to those immunities which International Law and existing Treaties have conferred upon them. That Prussian subjects, who, with the permission of their Sovereign, have been accredited as ministers from Foreign Courts to the Court of Prussia, shall be subject, so far as their private affairs are concerned, to the laws of Prussia. That ambassadors accredited by Prussia to foreign courts, are justiciable by the laws of the place of the domicile which they last had, previously to entering upon the discharge of their diplomatic duties. It is further provided that no reigning German Prince or Ambassador shall be subject to arrest by any Prussian tribunal, unless there has been a special reservation upon the subject made with respect to them previously to their reception at Court.^(r)

CCI. The ancient States-General of the Netherlands made an edict to the effect that no persons attached to an Embassy, on their arrival or on their departure, or on their passage through the country, should be liable to be arrested, or to be proceeded against on account of any debts contracted therein.

A similar law prevails in Denmark.^(s)

(n) 1640–1656.

(o) La Revue Etrangère, t. i. ii. p. 871, 555 et 648. Fælix, *ibid*.

(p) De Puttlingen, Die gesetzliche Behandlung der Ausländer in Oesterreich, u. s. w., ss. 52, 55, 116, 119.

“Die Gesandten, die öffentlichen Geschäftsträger, und die in ihren Diensten stehenden Personen, geniessen die in den öffentlichen Verträgen gegründeten Befreyungen.”—Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie, s. 39.

(q) C. i. s. 11.

(r) Allgemeines Landrecht für die Preussischen Staaten: Einleitung, ss. 36, 37, 38, 39. Fælix, *ibid*.

(s) Fælix, *ibid*.

CCII. Among the privileges which the usage of nations has imparted to the ambassador, and which are not derived from the reason of the thing, is the exemption of his person and his personalty from taxation. He is, moreover, generally exempt from the payment of duties upon articles imported for the use of himself or of his family.(t)¹

[*210] *CCIII. Different nations, however, adopt different regulations upon this head, both as to the amount of this free importation, and as to the time when it is permitted. Many nations limit it to a fixed sum during the continuance of the embassy.

The Roman Law(u) compelled the legate to pay duty on articles which he brought with him, but allowed him an exemption upon articles procured "ex Romano solo" for the purpose of transmission to his own country.

This immunity is never extended to—

1. Real property;
2. To personalty unconnected with the ambassadorial character;
3. And very seldom, if ever, to tolls and postages; and, generally speaking, it is clear that this class of privileges cannot be considered(x) as resting on an unalterable basis.

CCIV. The house, or, as it is usually called, the hotel of the ambassador is, by universal consent inviolable, and inaccessible to the ordinary officers of justice or revenue.(y)

[*211] *The same remark applies to his carriage. Upon this valuable and necessary immunity was at one time grafted the monstrous and unnecessary abuse of what was called the Right of Asylum. In other words, the hotel was to be a place of refuge for offenders against the law of the State in which it was situated. Bynkershoek(z) is clearly right in pronouncing that, whether common sense, the reason of the thing or the end and object of embassies be considered, there is not even that faint colour of reason which the most absurd pretensions can generally put forth, to be alleged in favour of such a custom. History teems with

(t) Wheaton, 1, 279. Heffters, s. 217. Merlin, *ibid.*, s. v. 3.

(u) "A legatis gentium devotarum, ex his tantum speciebus quas de locis propriis unde conveniunt, huc deportant octavarum vectigal accipiant: quas vero ex Romano solo, (quæ sunt tamen lege concessæ,) ad propria deferunt has habeant a præstatione immunes ac liberas."—Cod. l. iv. t. 61, 8.

(x) "Im Allgemeinen kann daher von einem feststellenden völkerrechtlichen Privilegium hinsichtlich dieses Punctes keine Rede seyn."—Heffters, *ibid.*

(y) Wicquefort, 1, s. 28. "La maison et les domestiques de l'ambassadeur sont inviolables."—P. 414.

Bynk. *ibid.*, c. xxi. "Ædes legati an præbent asylum."

Vattel, l. iv. c. ix. s. 117. "L'indépendance de l'ambassadeur serait fort imparfaite, et sa sûreté mal établie, si la maison où il loge ne jouissait d'une entière franchise, et si elle n'était pas inaccessible aux ministres ordinaires de la justice. . . . La maison d'un ambassadeur doit être à couvert de toute insulte sous la protection particulière des lois et du droit des gens: l'insulter, c'est se rendre coupable envers l'état et envers toutes les nations." Merlin, *ibid.*, v. 3.

(z) "Omnia legatorum privilegia, quibus utuntur ex tacito gentium consensu, non alio fine comparata sunt, quam ut tutò sine remorâ, sine impedimento cujusquam officio suo fungantur. Possunt autem tutò fungi, etiamsi facinorosos non recipiant, nec occultent, nec Principi, apud quem sunt, intervertant jurisdictionem, non in sui vel suorum, at tertii, ad se non pertinentis, gratiam. Sed ejusmodi hæc sunt, ut vix seriam disputationem desiderent."—Bynk. *ibid.*

examples of the evil consequences resulting from this absurd privilege, which was often extended from houses to whole districts and quarters of the town, as at Rome and Madrid.(a)

It is true that those States which have allowed this abuse are bound to give notice of their intention to abolish it previously to the reception of the ambassador. (b) But it is also true that there can be no prescriptive right in any nation to demand a continuance of this obstacle to good order, justice and *peace, wholly unconnected as it is with the maintenance of the security or dignity of embassies. And every [*212] government must agree with the wish of the learned Merlin,(c) that such a nuisance should be universally abolished.

No one can declare more strongly than Grotius that the *jus asyli* is no part *juris gentium*. "Ipse autem legatus an jurisdictionem habeat in familiam suam, et an jus asyli in domo suâ pro quibusvis eo confugientibus ex concessione pendet ejus apud quem agit. *Istud enim juris gentium non est.*"(d)

In 1726, the Duke of Ripperda, the First Minister of Philip V., took refuge in the hotel of Lord Stanhope, the English Ambassador at Madrid. The King asked for the opinion of the Council of Castille, the first tribunal in the kingdom, whether, without a violation of International Law, he had a right to take his subject Ripperda, accused of high-treason, by force, if other means were of no avail, from the Hotel of the English Ambassador;—the answer was in the affirmative, and Ripperda was accordingly taken by force from the hotel, and his papers were seized at the same time. The British Government, of which the Duke of Newcastle was then prime minister, complained bitterly of this act, and demanded reparation for an alleged insult to the ambassador; the complaint, however, was founded rather upon the manner in which the act was done, than upon a claim for the right, on the part of the ambassador, to have retained the refugee. Spain refused to make any reparation, and asserted boldly the legality of what she had done. The difference between the two nations increased in bitterness till, in the next year, war upon other grounds broke out between them. It would seem *to follow, [*213] from the principles which have been laid down, that Spain was not guilty of any violation of International law.(e)

(a) "The Polish Ambassador at Rome in 1680, the Spanish in 1682, the English in 1686, voluntarily renounced these exorbitant and mischievous privileges."—Miruss, s. 361.

(b) Wicquefort, citing the instance of certain conspirators seized by the Venetian Government in the house of the French Ambassador, and the answer with respect to it made by the Venetian Ambassador, that he would deliver up to justice any French rebels that took refuge in his hotel, adds: "On peut dire sur cet exemple, que, suivant le droit des gens, la maison de l'ambassadeur ne peut donner sûreté qu'à lui et à ses domestiques, et ne peut servir d'asyle aux étrangers que du consentement du souverain du lieu, qui peut estendre ou restreindre ce privilège comme il veut: *parcequ'il ne fait pas partie du droit des gens.*"—S. 28, p. 414.

(c) "On voit par ces détails, que le droit d'asyle est, à l'égard des hôtels des ambassadeurs, une source perpétuelle de dissensions et de querelles. Le bien des nations demanderait, sans doute, qu'on l'abolit tout-à-fait; et cela paraît d'autant plus raisonnable, qu'il y a plusieurs états dans lesquels il n'est point connu."—Merlin, *ibid*.

(d) L. ii. c. 18, viii. 2.

(e) De Martens, C. C. i. 174.

CCV. In 1747, a Swedish merchant of the name of Springer, accused of high-treason, took refuge in the hotel of the English Ambassador at Stockholm, Colonel Guideckens. The ambassador refused to surrender him; the Swedish Government surrounded his house with troops, searched every body who entered it, and caused the carriage of the ambassador, when he left the hotel, to be followed by a guard. Guideckens surrendered Springer under a protest as to the violence done to his ambassadorial privilege. England demanded reparation, and Sweden steadily refused to give it, and the ambassadors from the two courts were mutually withdrawn.

It seems clear that the conduct of Sweden was in accordance with the principles of International Law.(f)

CCVI. It sometimes happens that a State authorises a foreign State to acquire, within its territory, by purchase, a residence for its ambassador, and allows such residence to be vested in the Government of the country which accredits the ambassador.(g)

CCVII. So long, however, as the ambassador does not convert his hotel into a place of refuge for offenders against the laws of the State, he has a right to enjoy the most perfect and uncontrolled liberty of action within(h) the precincts of his hotel.

It seems a corollary from this proposition that he should be entitled to exercise privately the rites of his own religion, *though it be [214] at variance with that of the law of the State in which he is resident.(i)

CCVIII. Strictly speaking, however, this privilege is confined to himself, his suite, and his fellow-countrymen commorant in the foreign land; for although he cannot be prevented from receiving native subjects who come to his hotel, yet it is competent to the State(k) to prohibit them from going to the ambassador's hotel for this, or indeed for any purpose. According to Wicquefort, the State might require that the religious services be performed in the native language of the ambassador. This, however, does not appear to be a tenable position. The sanctity of the hotel must be violated, in order to ascertain the language, and certainly there never could have been any semblance of reason for preventing the ambassador or his chaplain from the use of the universal, or Latin language in their devotions. This restraint by the State must be placed, if at all, upon her own subjects.

CCIX. Since the period of the Reformation, general International usage has sanctioned the rights of private domestic devotion by a chaplain in the hotel, which, so long as it is strictly private, seems to claim the sanction of natural as well as conventional International Law. Two con-

(f) Ibid. i. 326.

(g) Act of the British Parliament "to authorize the purchase by the Prussian Minister of a residence in England for the use of the Prussian Legation, and to regulate the future holding of the same."—13 & 14 Vict. c. 3.—Hertslet's Treaties, vol. viii. p. 866.

(h) Wicquefort, *ibid.*, ss. 415, 418.

(i) Martens, ss. 224-5-6, generally on this subject.

(k) Martens, s. 225. Permission even for foreigners belonging to a third country to attend has been the subject of treaties.

ditions, however, have formerly accompanied the permission to exercise this right—one, that it should be permitted to only one minister at a time from one and the same court; another, that there should not be already a public or a private exercise of the religion existing and sanctioned without the precincts of the hotel.

Having regard to this latter condition, the Emperor Joseph II., having granted to the Protestants at Vienna the liberty of meeting for the private exercise of their devotion, insisted on the chapels of the Protestant ambassadors being closed.

*There does not, however, seem to be any foundation in principle for this very arbitrary act; more especially as Protestant [*215] is a mere term of negation, under which are included worshippers of very different tenets.

CCX. The only sound principle of law on this subject is that already mentioned, viz. :—Religious rites privately exercised within the ambassadorial precincts, and for his suite and countrymen, ought not to be interfered with.

The erection of a chapel or church, the use of bells, and of any national symbol, is a matter entirely of permission and comity.

*CHAPTER IX.

[*216]

AMBASSADORS—DIFFERENT CLASSES OF PUBLIC MINISTERS.

CCXI. THE Romans, and indeed the ancients generally, recognized but one class of diplomatic agents, whom they usually designated by the terms *oratores* or *legati*.

In Europe these terms found their translation at first in the generic term of Ambassadors, (a) or in some equivalent designation of a single class. Since the fifteenth or sixteenth century, the refinements and the vanity (b) of European Courts have introduced various grades of diplomatic agency into the positive Law of Nations, which are only so far of importance inasmuch as different ceremonial privileges are attached to the different degrees of legation.

But to the accredited public minister of every State, whatever be his designation, the rights of inviolability and the privileges of extritoriality appertain with equal certainty and strength. (c)

(a) *Ambassadeurs, Embaxadores, Ambaciatori*; perhaps from the Spanish *embiar*, to send, or more probably, regard being had to the similarity of the word in various languages, from *ambactus*. (Botschafter, Gesandter.)

(b) And the economy, it should seem, less expense and state being necessary for the minister of inferior rank. According to Vattel, Louis XI. set the example.—L. iv. c. vi. s. 69.

There have been two classes, Klüber says, since the beginning of the sixteenth, and three since the beginning of the eighteenth century.—S. 179.

(c) "*Legati varia nunc nomina rem ipsam idem sunt.*"—Bynk. De Foro Leg. c. i.
 "Quæcunque autem legatorum nomina sint et quæcunque legatio sive ordinaria, sive extraordinaria, quamvis et pro mittentis, et pro missi dignitate et titulo alius

[*217] *CCXII. Equally unknown to the ancients was the modern distinction of Ordinary, or Resident,^(d) and Extraordinary Ambassador.

The Romans, safe, as they reasonably concluded, in the vastness of their empire, from foreign invasion, and having but little commerce with other nations, neither required nor instituted any resident ambassadors in foreign countries.

CCXIII. The breaking up of this vast empire into various kingdoms introduced that necessity, which, under the gigantic domination of Rome, had not existed.

It was not, however, till after the Peace of Westphalia (1648) that the institution of permanent embassies, though beginning, contemporaneously with standing armies, to take root soon after the fifteenth century, can be said to have become the established practice of nations.^(e) It was about this period that the rights of legation began to be ascertained with the careful minuteness which distinguishes this part of positive International Law.

CCXIV. Before the close of the fifteenth century, a second order, and during the eighteenth century a third order, of diplomatic agents appears to have sprung up;^(f) and since the Congress of Vienna, in 1815, and the protocol of Aix-la-Chapelle,^(g) in 1818, to which Austria, France, Great Britain, *Prussia, and Russia were parties, the [*218] diplomatic hierarchy has consisted, technically speaking, of four orders, classified as follows:—

The first class is composed of ambassadors, ordinary and extraordinary,^(h) as their mission be limited or indeterminate in point of time, *Papal legates*, à or *de latere*, and *nuncios*, ordinary or extraordinary.

CCXV. All these diplomatic agents enjoy, in the fullest manner, the privileges incident to what is universally called the representative character, by virtue of which they represent their Sovereign or State, not only in the conduct of affairs at a foreign court, but they also represent⁽ⁱ⁾ the person of the Sovereign or State, and are by usage entitled, speaking generally, to the honours which the Sovereign or the State (if it could be conceived to be present) would receive.

atque alius legatis habeatur honor, id tamen constare debet, si, ut oportet ex jure gentium causam æstimemus, legati personam semper atque sancté habendam, semper æquè custodienda jura, quæ legatis, tanquam legatis, debentur.”—Bynk. *ibid.*

All classes of diplomatic agents have equally the “jus revocandi domum.”—*ibid.*

(d) Vattel, l. iv. c. vi. s. 73. (e) Ward, vol. ii. p. 413. Heffters, s. 199. Miruss, s. 89. Klüber, s. 170. Merlin, Répert., Ministre Public.

(f) Heffters, s. 357, n.

(g) Miruss, s. 85.

(h) E. g. such as are sent on embassies of congratulation, condolence, or excuse (Miruss, s. 86,) or to adjust some particular dispute, although there be a resident ambassador. Martens, s. 193.

(i) Merlin, (Rép., Ministre Public, s. 1,) however, says, “Nous disons que, dans un tel ministre, la représentation est *presque parfaite*, car elle ne l’est pas absolument: quels que soient les honneurs qu’on rend à un ambassadeur, ils n’égalent jamais et nulle part ceux qu’on rendrait à un souverain en personne; et c’est l’embarras de l’étiquette, à l’égard d’un souverain se trouvant en pays étranger, qui a fait imaginer *l’incognito*.”

This idea of the full representative character in the agent, had no doubt its origin in the fundamental constitution of Monarchical States, because it was possible to represent the person of the Monarch; but Republican States, nevertheless, have imitated the example.

CCXVI. Legates *à latere* must not be confounded with another class of Papal agents designated Nuncios.(k)

The legates *à latere* are sent by the Pope into Roman Catholic countries, to exercise, in his name, the spiritual functions which depend upon his recognition as Head of the Church.

The nuncios are ambassadors sent to foreign courts to *represent the Pope in the conduct of his affairs, of whatever kind [*219] they may be.(l)

CCXVII. The division of ambassadors and nuncios into ordinary and extraordinary, had its origin in the distinction between permanent or indeterminate missions, and those which had for their object the transaction of an extraordinary, particular, and determinate business.

In modern practice, however, the title "extraordinary" is given occasionally as a title of greater honour, even to ambassadors destined to a residence, for an indeterminate period, at the court to which they are sent.(m)

CCXVIII. Diplomatic agents of this first class can only be sent by States, whether monarchical or republican, entitled to royal honours. That is to say, that if an inferior State accredit an ambassador of the first class, he will not be received(n) by the great European powers. It is impossible, however, to maintain, as has been attempted, that the right to send ambassadors is confined to monarchies, or to deny that the rank of the ambassador, abstractedly speaking, depends upon the *sending* and not upon the *receiving* State.(o)

CCXIX. The second class comprises Envoys, (*Envoyés, Aëlegati, Prolegati, Inviati*) Ordinary and Extraordinary.

Ministers Plenipotentiary (*Plenâ potentiâ muniti, Ministres Plénipotentiaires, Bevollmächtigten Gesandten, Ministers*).

The Austrian Minister at Constantinople, who appears to be by custom exclusively designated as *Internuncius*.

The *Internuncio* of the Pope.

CCXX. The third, or intermediate class, created by the Conference of the Five Powers at Aix-la-Chapelle, in 1818, *is composed of what are called "*Ministres résidens*," accredited to the Sovereign. [*220] Ministers of this class are sometimes said to represent the affairs, and not the person of their Sovereign, and to be therefore of inferior dignity.(p)

(k) The *Legate* is selected from the cardinals, but not the *Nuncio*. Vide post, Merlin, *ibid*.

(l) Vide post, Chapter on RELIGION AND THE STATE.

(m) Martens, *ubi supr*.

(n) If he be received *at all*, it must be according to his credentials.—Vattel, l. iv. c. vi. s. 76. Vide post.

(o) Miruss, s. 113. Heffters, s. 209. Martens, s. 198. Vattel, l. iv. c. vi. s. 78.

(p) "Le résident ne représente pas la personne du prince dans sa dignité, mais seulement dans ses affaires."—Vattel, l. iv. c. vi. s. 73.

See below, remarks on his *real* identity with the envoy.

The fourth, usually denominated the third class, includes *Chargés d'Affaires* (*Geschäftsträger*) accredited to the Minister of Foreign Affairs. Either such as are originally sent and accredited *ad hoc*, or who have been nominated, either verbally or by writing, *ad interim*, during the absence of the minister,^(q) or accredited to courts to which it is not customary to send a formally constituted minister.

The ceremonial honours to which this class may be entitled appear doubtful, but they are entitled to the immunities of recognised diplomatic agents, though without the formal character of "Ministers." To this class belong *Consuls*,^(r) being accredited as diplomatic agents, or public ministers, such as are maintained by the Christian Powers of Europe and America at the Courts of the Barbary States or in Egypt.

CCXXI. These different orders of ministers, it must be observed, can only be distinguished by the ceremonial honours accorded to them; and, in fact, these divisions, which make the difference of order depend upon the difference of ceremonial, are, strictly speaking, illogical.^(s)

For if, upon this principle of distinction, it were asked why the ambassador enjoyed greater honours than the envoy, it *must be [*221] answered, because the former belongs to the first, and the latter to the second class; and if it were asked why the former belonged to the first, and the latter to the second class, it must be answered, because the former is an ambassador and the latter an envoy.

CCXXII. The only sound and logical division is that which is founded on the true principle of general International Law, viz., a regard to the character of the affair evidenced by his credentials (*mandatum, mandat*), entrusted to the management of the agent, whatever be his title. There is a clear distinction, according to the nature of things, between agents (*Plenipotentiaries*), accredited by one Sovereign to another Sovereign, and agents (*Chargés d'Affaires*), accredited by one Minister for Foreign Affairs to another Minister for Foreign Affairs.^(t)

There is also a distinction, less clear but conceivable, between the minister representing his Sovereign, both in his *person* and in his *affairs*, as is the case with the *ambassador*, and the minister representing the Sovereign in his affairs only, as, according to Vattel,^(u) is the case with the *Resident*, or even with the *Envoy*. Neither of these classes of ministers have the preeminently representative character (*caractère représentatif par excellence*) which belongs to the full ambassador.^(x) It is between these two classes, therefore, that Vattel pronounces "the most necessary and the only true distinction" to exist.

The juster division, however, appears to be that already stated, viz., between agents accredited to the Sovereign, and agents accredited to the Minister.

(q) Ordinarily the Secretary of Legation.—Merlin, *ibid.* s. 1, vi. Martens, s. 194. Klüber, s. 182. Martens, s. 194.

(r) "Si ce prince envoie un *agent* avec des lettres de créance, et pour affaires publiques, l'*agent* est dès-lors ministre public: le titre n'y fait rien."—Vattel, l. iv. c. vi. s. 75.

(s) There is much truth in M. Pineheiro Ferreira's remarks on this point.—Note to 192nd section of Martens.

(t) Martens, s. 191. Wheaton, 1, 262, s. 6.

(u) L. iv. c. vi. s. 73. "Le Résident," &c.

(x) Martens, s. 193, Notes, &c.

CCXXIII. It has been already observed, that all these different classes enjoy equally the immunities(*y*) incident to *the *jus legationum* (*droit le legation, d'ambassade, Gesandtschaftsrecht.*) [*222]

According to the fourth article of the Congress of Vienna, (1815,) the rank of diplomatic agents between themselves was to be determined by reference to the date of the official notification of their arrival at the court to which they are accredited; and by the sixth article, as we have already seen, (*z*) all distinctions of rank between diplomatic ministers, arising out of the ties of consanguinity and the domestic or political relations of their respective courts, are abolished.

CCXXIV. Every State may determine for itself what rank it will confer upon its diplomatic agents; nor is it restricted by International Law as to their number, (*a*) their sex, (*b*) their religion, (*c*) or their station, whether lay or clerical, military or civil, (*d*) unless the latter be opposed to a fundamental law of the receiving State. It is usual for States to send and receive diplomatic agents of equal rank.

A diplomatic agent may be accredited at one and the same time to various States, as the history of Germany and Switzerland abundantly testifies. (*e*)

A diplomatic agent may be fully empowered to negotiate with foreign States, as at a congress of different nations, without being accredited to any particular court: or he may be accredited by a *third* State to mediate between two other States. (*f*)

*CCXXV. The legal *status* of mere agents employed, on behalf of Governments or Princes, in foreign countries is not very clearly [*223] defined by any writer upon International Jurisprudence. (*g*)

It is clear, however, that agents employed in adjusting private claims of the Sovereign, or negotiating a loan, commissioners to settle boundaries, and the like, are not *virtute officii* clothed with the immunities of a diplomatic agent. The same remark applies to secret emissaries of a State, though sent with the permission of the foreign State into its territory.

These commissioners or emissaries, though furnished perhaps with (*h*) *letters of recommendation* from their Sovereign, and therefore entitled to more consideration than private individuals, are not accredited, and therefore cannot claim the *jus legationum*.

If, however, the State clothe them with diplomatic powers, and accredit

(*y*) Heffters, 208. "In Ansehung der gesandtschaftlichen Geschäfte selbst, der Fähigkeit dazu, und ihrer Giltigkeit, ist der ganze Rangunterschied völlig ohne Einfluss."

(*z*) Vide ante, Chapter on SOVEREIGNS. Martens, s. 199.

(*a*) Miruss, s. 117.

(*b*) Martens, s. 120. Moser, Die Gesandten nach ihren Rechten und Pflichten. —Kleine Schriften, t. 3, n. 2. Miruss, s. 127.

(*c*) Vide post, RELIGION AND THE STATE.

The Bishop of Ross was Mary Queen of Scots' ambassador; the Bishop of Bristol was plenipotentiary at the Peace of Utrecht, the last instance of the diplomatic employment of an English Bishop.

(*d*) Klüber, s. 187.

(*e*) Miruss, s. 120.

(*f*) Miruss, s. 86, n. a.

(*g*) Wicquefort, l. pp. 62–3. Vattel, l. iv. c. vi. s. 75. Heffters, s. 222. Klüber, s. 171–2. Martens, s. 196–7, and P. Ferreira's notes thereupon. Miruss, ss. 107, 111.

(*h*) Martens, s. 203.

them to a foreign State, they become entitled to the immunities of a diplomatic agent.⁽ⁱ⁾

This is also the case with deputies sent to a Congress on behalf of a Confederation of States, if they be accredited. The whole question [224] depends upon whether or no the constituent *body has been competent, and has intended to clothe them with a ministerial character.

CCXXVI. Consuls, generally speaking, are not entitled to the *jus legationum*. The institution of the consulate being of great importance and some complexity, must be reserved for a separate and distinct discussion.^(k)

[225]

*CHAPTER X.

AMBASSADORS—INSTRUCTIONS.

CCXXVII. WITH reference to the State which he represents, the public character of the ambassador may be said to begin with the receipt of his instructions, which contain the measure of his responsibility to his own Government. These are for his own guidance; they may be secret or ostensible to the court to which he is accredited, or their partial or entire communication may be left to his discretion.^(a)

Despatches addressed to him after his departure may contain, in substance or in form, subsequent and additional instructions.

CCXXVIII. Vattel remarks, that if the ratification of the principal were not now held necessary for any engagement entered into by the ambassador, these instructions would be liable to those principles of construction which natural^(b) law would apply to the matter of agency and procuration (*procuracion, mandement*.)

CCXXIX. With reference to the State to which he is sent, the public character of the ambassador receives its formal recognition on the production of his Letters of Credence (**lettres de créance, creditiv*, [226] *Credentials, Beglaubigungsschreiben*).^(d)

(i) "Le mesme mot (*Commissaire*) a souvent une signification plus estenduë, et marque un ministre qui n'a point d'autre qualité particulière; et alors il peut estre ministre public, soit qu'il ait esté envoyé à un congrès ou à quelque prince ou république."—1 Wicquefort, 64. Miruss, s. 86. Geschäfts-Gesandte.

"Si ce prince envoie un *agent* avec des lettres de créance, et pour affaires publiques, l'agent est dès-lors ministre public: le titre n'y fait rien." "Il faut en dire autant des *députés, commissaries*, et autres chargés d'affaires publiques."—Vattel, Ibid.

"Tout dépend de la question de savoir jusqu'à quel point leur constituant a pu et voulu leur attribuer un caractère ministériel."—Martens, *ibid*.

(k) Vide post, Part Seventh, Chapter I.

(a) Vattel, l. iv. c. vi. s. 77. Wheaton, 1, s. 268. Heffters, s. 210. Martens, s. 205.

Bynkershoek, Q. J. P. l. 2, c. vi. "Legati quid rerum olim egerint, et nunc agant cum publicè audiuntur."

(b) Here the Justinian law would be almost necessarily resorted to.

(c) Miruss, s. 133.

(d) Vattel, l. iv. c. vi. s. 76. "Les lettres de créance sont l'instrument qui auto-

This instrument is addressed by the Sovereign or chief magistrate of the State which the ambassador represents to the Sovereign or State to which he is sent. In the case of a *chargé d'affaires*, it is addressed by one Minister of Foreign Affairs to another.(e) It contains the general purport of the mission, and the name and class of the diplomatic agent, and requests that faith may be given to his representations on the part of his principal.(f) The same Letters of Credence may suffice for several ministers, if they be of the same rank.

Sometimes one minister is furnished with several Letters of Credence, if he be accredited to several Sovereigns or States, or to the same Sovereign in various capacities. If the rank of the diplomatic agent be changed during his residence at a foreign court, fresh Letters of Credence are required, and the ceremonies incident to their presentation are renewed.(g) According to modern custom, the Full Power empowering the diplomatic agent to negotiate, is not inserted in the Letters of Credence, but is a separate instrument, drawn up in the form of letters-patent (*mandatum procuratorium, pleni-potentia, plein pouvoir, Vollmacht*). (h)

*CCXXX. It is the Full Power, whether it be a separate instrument or contained in the Letters of Credence, which founds [*227] the authority of the diplomatic agent as the representative of his Sovereign, and the terms of it are binding on him and his principal, though at variance with secret instructions.

This important principle of International Law, which clearly flows from the reason of the thing, is supported by the express authority of Grotius,(i) and by the analogy of the law of mercantile agency, as set forth in the Digest, which is in this instance, as in others, the written Law of Nations.(k)

rise et constitue le ministre dans son caractère auprès du prince à qui elles sont adressées. Si ce prince reçoit le ministre, il ne peut le recevoir que dans la qualité que lui donnent ses lettres de créance. Elles sont comme sa procuration générale, son *mandement ouvert, mandatum manifestum*."

Ibid., s. 83. "Dès qu'il est entré dans le pays où il est envoyé, et qu'il se fait connaître, il est sous la protection du droit des gens." Heffters, s. 200.

(e) Martens, s. 202. Wheaton, 1, 267.

(f) Martens, ubi supr.

(g) Heffters, s. 210.

(h) Vattel does not mention the instrument of Full Powers as distinct from the Letters of Credence. Miruss, s. 136, 1-141. Martens, s. 204. Wheaton, 1, 268. Heffters, s. 210.

(i) Grotius, l. ii. c. xi. s. 12. "Sed et per hominem alterum obligamur, si constet de voluntate nostrâ, quâ illum elegerimus, ut instrumentum nostrum ad hoc speciatim, aut sub generali notione. Et in generali præpositione accidere potest, ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatam: quia hic distincti sunt actus volendi: unus, quo nos obligamus ratum habituros quicquid ille in tali negotiorum genere fecerit, alter, quo illum nobis obligamus ut non agat nisi ex præscripto, sibi non aliis cognito. Quod notandum est ad ea, quæ Legati promittunt pro Regibus ex vi instrumenti procuratorii, excedendo arcana mandata."

Ib. s. xiii. "Atque hinc etiam intelligi potest exercitoriam et institoriam, quæ non tam actiones sunt quam qualitates actionum, ipso naturali jure niti. Bynk. Q. J. P. l. ii. s. 2, c. 7.

(k) "Ut autem obtinuit, Jus Justinianæum appellari *Jus commune*, ita vicissim Jus commune genere quodam reciprocationis, appellabitur Jus Cæsareum."—Bynkershoek, Q. J. P. l. i. c. xxiv.

The Full power may be general or special. The general Full Power (*mandatum illimitatum*) capacitates the holder of it for all the usual diplomatic functions, or for negotiating generally with a foreign State.

There are some instances of such a Full Power being construed, as accrediting the bearer to all courts (*actus ad omnes populos*;)(*l*) but this construction has long ceased to be maintained.

[*228] *The special Full Power (*mandatum limitatum*) authorizes the holder of it to transact only a particular business: the limits of his authority are defined, and out of these he cannot travel.

CCXXXI. If these powers be granted to several persons, it should be expressed in them(*m*) whether they may act severally or only jointly in the execution of their office. In time of peace, the diplomatic agent is sufficiently protected by the passport of his own government. In time of war, he must be provided with a pass of safe conduct (*sauf conduit, salvi conductus literæ*), to ensure his protection while travelling through the territories of the enemy of his State.(*n*)

[*229]

*CHAPTER XI.

AMBASSADORS—ARRIVAL—AUDIENCE.

CCXXXII. EVERY diplomatic agent must notify his arrival to the Minister for Foreign Affairs.(*a*)

If the diplomatic agent be of the first class, his arrival is communicated through the Secretary of the Embassy, or some other gentleman (*Gesandtschaftscavalier*) attached to the mission.

He delivers a copy of the Letters of Credence to the Minister for Foreign Affairs, and requests an audience for his principal with the Sovereign.

This audience may be either public or private: diplomatic agents of the first class are alone entitled to the former. But this audience is not a necessary preliminary to his entering upon the performance of his functions.

The public audience used to be preceded by a *solemn entry* (*entrée solennelle*), the details of which, such as the number of horses which may draw the ambassador's coach, the staircase by which he is to ascend, and the like, have been dwelt upon with patient and characteristic minuteness by many German publicists. (*b*)The ceremony has now fallen into general desuetude.

(*l*) Miruss, s. 137.

Klüber, s. 193, n. c., who says that two instances are found in Lamberty, *Mémoires*, viii. 748, ix. 653.

Martens, s. 204, n. 6, cites De Torey, *Mémoires*, t. iii. p. 65, and says, that the *plene pouvoir* given by the First Consul to Augereau, in 1800, to make peace with the princes of the empire, was of this description.

(*m*) Martens, s. 204.

(*n*) Miruss, s. 135. Wheaton, 1, 268-9.

(*a*) Martens, s. 206. Miruss, s. 307. Wheaton, 1, 270.

(*b*) "Au reste, toute cette pénible cérémonie de l'audience solennelle est peu nécessaire, même à un ambassadeur, pour entrer en fonctions," &c. Martens, *ibid*.

At the audience, which is now usually private, the Letters of Credence are delivered, a complimentary speech is made by the ambassador, and replied to by the Sovereign.

*CCXXXIII. If the diplomatic agent be of the second or third class, his arrival is notified by a letter to the Minister for [*230] Foreign Affairs, who is requested to take the orders of his Sovereign respecting the delivery of the Letters of Credence.

It should seem that the majority of European courts would concede to these diplomatic agents the privilege of a public audience.(c) In practice, however, the Sovereign usually receives them at a private audience, at which the Minister for Foreign Affairs restores to them their Letters of Credence.

If the diplomatic agent be of the fourth class, if he be a *Chargé d'Affaires* not accredited to the Sovereign, his arrival is notified by letter to the Minister for Foreign Affairs, of whom alone an audience is requested for the purpose of delivering the Letters of Credence.(d).

"In Republican States," Mr. Wheaton observes, "the diplomatic agent is received in a similar manner by the chief executive magistrate or council charged with the foreign affairs of the nation." It should seem, however, that though there is less uniformity in republican courts as to the observance of the ceremonies of a public audience, they have nevertheless retained the principal circumstances of the etiquette practised by monarchical courts upon these occasions.(e)

CCXXXIV. The rules of etiquette which long usage has established between diplomatic agents resident at the same foreign court, and towards the members of the foreign government, occupy many pages of some works upon International Law; but these rules, though their observance on the ground of convenience be very desirable, and their non-observance would denote ill-breeding in the State renouncing them, do not arrive at the dignity of laws, or attain the character of rights.(f)

*CCXXXV. Merlin's remark is sound and just, that there is but one general rule on this subject: namely, that public minis- [*231] ters should receive all the distinctions which etiquette and the manners of each nation have determined, as marks of that estimation which is befitting.

It must be remembered that custom may impart a value to a ceremony in itself indifferent, but which has become significant of the estimation in which the object of the ceremony is held. We have seen an instance of this in the honours of the salute paid to the flags of nations. When usage has attached a real value to a point of etiquette, the omission of it is not justifiable by any principle of International Law.(g)

(c) Martens, s. 207. Miruss, s. 311, would seem to deny this.

(d) Wheaton, *ibid.*

(e) Martens, s. 206.

(f) Wheaton, 1, 272. Merlin, *ibid.*, s. iv.

(g) "Quand une coutume," says Vattel, "est tellement établie qu'elle donne une valeur réelle à des choses indifférentes de leur nature, et une signification constante suivant les mœurs et les usages, le droit des gens naturel et nécessaire oblige d'avoir égard à cette institution, et de se conduire par rapport à ces choses-là, comme si elles avaient elles-mêmes la valeur que les hommes y ont attachée."—L. iv. c. vi. s. 79.

CCXXXVI. Nevertheless, it must always be competent to a Sovereign to make alterations in the ceremonies of his court: he must of course be prepared for two consequences—one would probably be, that foreign nations will refuse to accredit diplomatic agents to him to be received upon the footing of these alterations; another, in all likelihood, would be, that he must submit himself to retaliatory alterations, in the person of his own representatives at foreign courts.^(h)

CCXXXVII. (i) The mission of a diplomatic minister may be:—

1. Altered in its rank or character.
2. Suspended.
3. Entirely closed or ended.

[*232] CCXXXVIII. It is altered in its character when the grade *of the embassy is heightened or lowered, when an envoy becomes an ambassador, or *vice versâ*, or when an ambassador, sent on an affair of ceremony, becomes a resident ambassador. By such changes as these the embassy is not suspended or ended, but only changed as to its diplomatic rank or character.

CCXXXIX. Various events may happen which suspend the functions of the ambassador; for instance, the death of his Sovereign may have this effect only, though it may also end his mission. During this interval, however, he enjoys all the privileges of inviolability and extraterritoriality which appertain to his office. These remain until his embassy be *bonâ fide* terminated, and until he has left the territory of the State to which he has been accredited. Thus, Grotius observes: “In *itu* continuo et de *reditu* censetur, non hoc ex vi verbi, sed ut absurdum vitetur: neque enim inutile esse beneficium debet. Et abitus tutus intelligendus usque dum eo pervenerit ubi in tuto sit.”^(k)

CCXL. The mission is ended by:—

1. The lapse of a particular period, as in the case of an ambassador appointed *ad interim*, when the regular ambassador returns to his post.
2. By the accomplishment of the particular object of the mission, as in the case of an embassy sent for the purpose of congratulation, or to represent a State at a particular ceremony; or when there has been a special and limited object to the mission which has either been attained or has failed.
3. By the death, abdication, or dethronement of the Sovereign accrediting the ambassador, or by the death of the Sovereign to whom he is accredited. In both these cases, according to International Usage and Practice, the ambassador must be accredited anew by his Sovereign. Though in cases in which it is known that his mission is only suspended, and that he will be re-accredited, it is usual to continue to transact business *sub spe rati* with him as ambassador.

[*233] 4. By the formal declaration of the ambassador, on account *of some injury or insult, or of some pressing urgency, that his mission must be considered as closed.

(h) Merlin, s. iv. See also Martens, s. 184, upon this point.

(i) Martens, l. iv. c. 3, s. 148. Miruss, ss. 366–370. Klüber, ss. 228–230. Wheaton, Dr. Int. i. ss. 23, 24.

(k) L. iii. c. xxi. 16.

5. By the act of the Court to which he is accredited, when that Court, on the ground of his misconduct, or of a quarrel with his government, orders the ambassador to leave the territory, without waiting for his formal recall.

6. By the voluntary resignation of his office by the ambassador himself.

7. By his recall by the government which accredited him.

CCXLI. In the last-mentioned case it is usual for the ambassador to request an audience, more or less formal, according to circumstances, with the Sovereign to whom he is accredited, and to deliver to him the order or letter recalling him (*lettres de rappel, Zurückberufungs-schreiben.*) He afterwards usually receives, in return, letters or papers to facilitate his return (what are termed *lettres de récréance, (l) recreditio,*) and his passport, and sometimes a present; but the Republic of the North American United States follows the example of the ancient Republic of Venice, and forbids her representatives to accept any such present.

CCXLII. When the death of the ambassador himself ends his mission, the first step that the Secretary of Legation—or, in his default, some minister of an allied power—takes is to affix a seal upon his official papers, and, if necessary, upon his moveables. It is only a case of necessity that warrants the interference of the local authority. His corpse is entitled to a decent burial at the place of his death, or it may be removed for the purpose of interment elsewhere; and it is exempted *from any mortuary dues usually payable in the country. All [*234] questions relating to his moveable property, whether he died [testate or intestate, are, by a long-established rule of International Comity, determinable only by the laws of his domicil or of his own country. His moveables are also exempt from any kind of tax or impost (*droit d'aubaine, detractio.*) It is usual also to continue to the widow, family, and suite of the deceased, the privileges and immunities incident to his office, for such limited period as may reasonably suffice to enable them to leave the country.

(l) "Récréance est aussi en usage dans cette phrase, *lettres de récréance*, qui se dit, soit des lettres qu'un prince envoie à son ambassadeur, pour les présenter au prince d'auprès duquel il le rappelle; soit des lettres que ce prince donne à un ambassadeur, afin qu'il les rende, à son retour, au prince qui le rappelle. Le roi de Prusse envoya une lettre de récréance à son ambassadeur pour le faire revenir. Le roi d'Espagne donna une lettre de récréance à l'ambassadeur de France, lorsqu'il prit son audience de congé."—Dict. de l'Acad., v. Récréance.

PART THE SEVENTH.

[*235]

*CHAPTER I.

CONSULS—HISTORICAL INTRODUCTION.

CCXLIII. IN the second chapter of the former volume of this work, (a) mention was made of a class of public officers who, though not clothed, accurately speaking, with a representative character, are entitled to a *quasi* diplomatic position, namely Consuls. (b)

It is proposed now to take into consideration the character and functions imparted by International Law to this class of public officers.

CCXLIV. The institution of a Foreign Consulate, within the territory of an independent nation, is a most important result of International Comity; but inasmuch as Custom, Prescription, and Treaty, have placed the Resident Consulate, as much as the Resident Embassy, within the domain of Right, it seems more properly discussed in this portion of the work than in that portion which is devoted to the exclusive consideration of questions relating to International Comity. (c) The origin of this institution is probably traceable to that Domestic Consulate which, after the fall of the Western Empire, was during the earlier part of the middle ages, founded in most of the maritime cities of the south *connected with commerce and navigation; and for the decision of which, it relied mainly upon principles gleaned from the Roman and Greek Law.

The tribunals of the domestic institutions were occupied by judges, (d) known by the name of *Juges Consuls*, or *Consuls Marchands*; while the foreign institution was dependent on certain officers known by the title of *Consuls d'outre mer*, or *Consuls à l'Etranger*. These latter officers were persons sent by independent countries, or free cities, to the seaports and adjacent towns of foreign kingdoms for the purpose of protecting the national commerce, especially in matters of shipwreck, of watching over national interests and privileges, and of adjusting disputes between national sailors and merchants. (e)

(a) Vide ante, vol. i. p. 10.

(b) Miltitz, *Manuel des Consuls*, t. i. p. 6; a work of marvellous research and great ability.

(c) Vide ante, vol. i. pp. 12, 13, *et præsertim*, pp. 160–1.

(d) The term "*consulaire*" is still used as synonymous with "*commercial*" on the Continent. "*Sentence consulaire*," "*condemnation consulaire*," "*jurisdiction consulaire*," as expressing the attributes and powers of "*tribunaux de commerce*."—De Martens, *Le Guide Diplomatique*, t. i. p. 238, notes.

(e) The first chapter of the famous *Consolato del Mare* is in these words:—"Sogliono ogn' anno il dì del Natale del nostro Signore; all' ora del vespero gli uomini da bene naviganti, e padroni, marinari, o tutti, o maggior parte di quelli ragunarsi in consiglio, in un luogo da loro eletto, e deputato, come per usanza hanno nella Città di Valenza; e quivi per elezione, e non per sorte, tutti insieme

The perils to which infant commerce was exposed, and the insecurity of personal intercourse with foreigners during the times of oppression which followed the overthrow of the Western Empire, rendered the two following objects matters of the greatest importance :—

1. The obtaining in foreign countries a place of safe deposit for merchandize.

2. A jurisdiction within the limits of it, independent of the country in which it was situated.

About the eleventh century *depositories* and a *jurisdiction* in Europe, for the purpose of taking cognizance of all questions *of this kind sprang into existence under the protection of Consuls upon [*237] the shores of the Mediterranean Sea; and in the East, the establishment of similar institutions upon the coast of Syria was one of the immediate consequences of the Crusades. The establishment of factories in Greece by the inhabitants of Amalphi and Venice, indeed, preceded the Crusades, while the establishments of factories in Syria was the fruit of those conquests. These were at first under the protection of the Christian and Frank sovereignties, which, from the conquest of Palestine till the thirteenth century, maintained their position in the East.

During this period, a system seems to have prevailed that every European should be amenable only to the law of his native country. (f) After this period when the East had fallen under the captivity of Islam, treaties were entered into (of which the fourteenth century furnishes abundant examples) between the Christian and Moslem powers, and especially in Egypt, which confirmed the establishment of European consulates in Mahometan countries.

About the same time the institution began to extend itself, keeping pace with the extension of trade, beyond the limits of the Mediterranean, over the northern and eastern coasts of Europe. In the ports of the Baltic and the Mediterranean especially, foreign merchants inhabited particular quarters of the town, subject to the jurisdiction and authority of their Consuls, who were also designated by various titles, according to the customs of various countries, viz. : *Governors, Protectors, *Ancients, Aldermen, (g) Syndics, Jurats, Prévosts, Capitouls, [*238] Echevins*, and who administered justice to their fellow-countrymen according to their national laws, and maintained the privileges conceded to them in all matters, especially as to the use of the weights, measures, and coins of their respective countries.

The organization of the Consulate was more or less complete, accord-

raccolti, o la maggior parte di loro, eleggono due uomini da bene, dell' arte del mare, per loro Consoli, e per Giudici un' altro della medesima fazione del mare, e non d'altro qualsisia ufficio o arte; e questo eleggono per Giudice delle appellazioni, le quali appellazioni si fanno delle sentenze date per i predetti Consoli. E. le sopradette elezioni si fanno per vigore de' privilegi ottenuti dal Re, e dagli antecessori di quello, quali privilegi hanno gli uomini da bene della sopradetta arte del mare." Then follow several chapters as to the mode of exercising their jurisdiction, both by the Consuls and the Court of Appeal.

(f) Vide post, DOMICIL. Miltitz, l. ii. c. 1. Résumé Ph. 394–401. Heffters, Drittes Buch, iii. Die Consuln, s. 224.

(g) Appellation of the Hanse Towns.

ing as the interests which the Consul had to protect were more or less regular, as the obstacles they had to encounter were greater or less, as the Municipal Laws of the State, in which they were established, were more or less penetrated by the commercial spirit. The Levant produced the best specimens of the institution; and Venice, Genoa, Marseilles, and Barcelona appear to have been the cities in which it attained the greatest perfection.^(h)

At this time when the faith of Treaties was little respected; when even alliances of States, subjected as they were to frequent violations, offered but a feeble guarantee for the security of life and property to the stranger; when one nation generally regarded the trade of another as an injury to her own subjects; when embassies were of rare occurrence and of short duration, and when there were no Resident Ambassadors, International Commerce would have withered away without the protecting shadow of the Consulate. Consuls alone, at this time, enjoyed the full privileges of the *jus gentium*, and all the immunities accorded at the present time to Ambassadors.

Before the middle of the seventeenth century, however, a great change had been effected in the whole condition of International Commerce, and of International intercourse generally. About this time, permanent and perpetual legations had become a part of the received Public Law of Europe; the idea of national independence, moreover, had taken deep root, and [239] the extraterritorial jurisdiction, both criminal and civil, of the Consuls was wholly at variance with this principle; at the same time the general refinement of manners, and the improvement of Municipal Law, rendered it less necessary; and throughout Christian Europe, this jurisdiction passed into the hands of the territorial authorities.

The mediæval institution of consular jurisdiction, under the influence of these causes, entirely changed its condition and character, and shrank into a general vigilance of the Consul over the interests of the shipping and navigation of his nation, and into a kind of authority, not very accurately defined,⁽ⁱ⁾ over the members of it at a particular locality.

This is the position which, in Christian countries, the Consulate occupies at the present day. In Mahometan countries, however, States have retained, by virtue of express stipulations in Treaties, the *jus gentium* incident to accredited ministers, together with the especial prerogatives of jurisdiction, which have been alluded to.^(k)

CCXLV. The status of the Consulate, therefore at the present time seems to require a twofold division, viz. :—

1. The legal *status* of Consuls in Christian countries.
2. The legal *status* of Consuls in the Levant and in Mahometan countries.

(h) Miltitz, 1, ii. c. 2, s. viii. p. 492.

(i) "*A l'aimable, amiablement*," in the Consular Instructions put forth by France and Greece.

(k) Miltitz, l. iii. c. 1. Bynkershoek, *De Foro Leg.* vol. vi. c. x. Martens, *Droit des Gens*, l. iv. c. iii. s. 147. Vattel, l. ii. c. ii. s. 34.

*CHAPTER II.(a)

[*240]

MODERN CONSULATES IN CHRISTIAN COUNTRIES.

CCXLVI. CONSULS in Christian countries are not, legally speaking, Public Ministers of the State to which they belong, though having a public character, they are under a more special protection of International Law than uncommissioned individuals. This protection they have a right to claim both from the State which sends, and from the State which admits them. But they are not the representatives of their State, or entitled to any of the privileges and immunities accorded to such representatives, whether they be full ambassadors, or simple *chargés d'affaires*, and for these more especial reasons :

*1. They are not, except in cases where they are also *chargés d'affaires*, (b) furnished with credentials (*lettres de créance*), but [*241] with a mere commission (*lettres de provision*) to watch over the commercial rights and privileges of their nations.

2. They cannot enter upon the discharge of their functions without the permission and confirmation of their commission by the Sovereign of the country to which they are deputed. That commission is termed the *exequatur*, and may, at any time, be revoked by such Sovereign.

3. As a general rule, they are amenable to the civil and criminal jurisdiction of the country in which they reside. Vattel's position, that they are exempted from the latter, is wholly unsupported by the requisite proof.(c)

(a) Kent's Commentaries, &c., vol. i. part 1, l. ii. p. 41. Wheaton's Hist. p. 244. Wheaton's Elements, &c., vol. i. p. 282. Fynn's British Consul Abroad, passim. Wildman's Int. Law, vol. i. p. 130; vol. ii. p. 41. Heffters, Drittes Buch, p. 223. Ortolan, Dipl. de la Mer, t. i. p. 275. De Martens et De Cussey, i. Index Expl. "Consuls." Wicquefort, t. i. s. 5, p. 1. Valin, Ord., vol. i. l. 1, t. 9. De Consuls. Saalfeld, Handbuch des Positiven Völkerrechts, p. 117, s. 55. A very useful and correct summary of the duties and rights of Consuls.

Report from the Select Committee on Consular Establishments, laid before Parliament, 10th August, 1835.

Félix, Droit International Privé, ch. Exterritorialité.

Flassan, Histoire Générale et Raisonnée de la Diplomatie Française, t. i. vii.

Grundsätze des Praktischen Europäischen Seerechts, Von Kaltenboon, Berlin, 1851; ii. 352, s. 216.

Le Guide Diplomatique, par le B. Charles De Martens, t. i. c. 12, p. 236. (4th Ed. 1851.)

(b) The Consuls-General of France, at Cairo, Tunis, Tripoli, and in the capital of the South American Republics, and also, it is believed, at Canton and Manilla, are *chargés d'affaires*, as well as Consuls. The French agent at Bucharest is accredited as "Agent et Consul-Général." The powers of these Consuls are of a much more extended character than those of the European Consuls.—De Martens, ib. i. 257. n.

(c) Vattel, t. i. l. ii. c. ii. s. 34. "Ses fonctions exigent premièrement qu'il ne soit point sujet de l'état où il réside; car il serait obligé d'en suivre les ordres en toutes choses, et n'aurait pas la liberté de faire les fonctions de sa charge. Elles paraissent même demander que le Consul soit indépendant de la justice criminelle ordinaire du lieu où il réside, en sorte qu'il ne puisse être molesté, ou mis en prison, à moins qu'il ne viole lui-même le droit des gens par quelque attentat énorme."

*4. They are subject to the payment of taxes.

[*242] 5. The permission to have places of worship in their houses is very rarely accorded to Consuls.(d)

6. They have no claim to any foreign ceremonial or mark of respect, and no right of precedence, except among themselves according to the rank of the different States to which they belong, but they have a right to place the arms of their country over the door of their residence.

CCXLVII. De Martens(e) is of opinion that unless they have engaged in trade, or become owners of immoveable property in the country, they cannot be arrested or incarcerated for any less offence than a criminal act. As a part of the results of the ever-memorable action at Algiers, Lord Exmouth demanded and obtained full compensation from the Dey for all injuries and losses inflicted on the British Consul, and caused him to beg [*243] pardon in terms dictated for having imprisoned *him; moreover, he insisted on the release(f) of the Spanish Vice-Consul, imprisoned upon a fictitious charge of debt.

When the French protectorate(g) had been established by Admiral Dupetit Thouars over Tahiti, in 1842, the French found themselves the objects of ill-concealed hostility. This they attributed to the influence of the English missionaries in the island. A Mr. Pritchard, who had

"Et bien que l'importance des fonctions consulaires ne soit point assez relevée pour procurer à la personne du Consul l'inviolabilité et l'absolue indépendance dont jouissent les ministres publics, comme il est sous la protection particulière du souverain qui l'emploie, et chargé de veiller à ses intérêts, s'il tombe en faute, les égards dus à son maître demandent qu'il lui soit renvoyé pour être puni. C'est ainsi qu'en usent les états qui veulent vivre en bonne intelligence. Mais le plus sûr est de pourvoir, autant qu'on le peut, à toutes ces choses, par le traité de commerce."

"On peut accorder" (says De Martens, l. iv. c. iii. s. 148, note) "que la plupart des états ne refuseraient pas l'extradition."

"Considering the importance of the consular functions, and the activity which is required of them in all great maritime ports, and the approach which Consuls make to the efficacy and dignity of diplomatic characters, it was a wise provision in the Constitution of the United States which gave to the Supreme Court original jurisdiction in all cases affecting Consuls, as well as Ambassadors and other public ministers; and the federal jurisdiction is understood to be exclusive of the State Courts."—1 Kent, 45.

(d) The second separate article of the Treaty between France and the Hanse Towns, stipulated 1716.

"I. Que si un ministre de Sa Majesté, résidant dans une desdites villes, vient à y décéder, il sera permis à sa famille, héritiers, ou ayant cause de continuer, en payant le loyer, d'y tenir chapelle, ainsi qu'elle s'y tenait pendant la vie dudit Résident, et ce pendant trois mois seulement, à compter du jour de son décès, à moins que Sa Majesté, avant ce temps-là, n'eût choisi une autre maison dans laquelle l'établissement d'une chapelle aurait aussi-tôt été fait, auquel cas elle cessera dans la maison dudit défunt.

"II. Que le Roi donnera des ordres précis et effectifs dans tous les ports et lieux nécessaires, pour qu'il ne soit apporté aucun trouble ni empêchement aux sujets desdites villes de *Lubeck Bremen et Hambourgh*, lors de la cérémonie des obsèques de ceux d'entr'eux qui seront décédés, dans l'étendue des terres de l'obéissance de Sa Majesté, et ce sous peine de prison contre les contrevenans, et de telle amende qu'il appartiendra."—Schmauss, ii. 1623. See Wenck, vol. iii. p. 769, for the Treaty between France and Hamburg, A. D. 1769. Fynn, 13. De Martens, Dr des Gens, i. 149.

(e) De Martens, *Le Guide Dipl.* i. 250.

(f) *Annual Register* (1816,) vol. lviii. pp. 104, 237-8-9.

(g) This account is taken from the *Annual Register* for 1841.

gone out originally as a missionary, was at this juncture acting as British Consul. He had, indeed, a short time previously, notified to the English Government his resignation of that office; but, as intelligence of the acceptance of this resignation had not reached Tahiti, he was still clothed with the character and exercising the functions of Consul. The French officers looked upon him as the chief author of the disturbances that broke out from time to time, and of the opposition evinced to their authority. On the night of the 2nd of March, in 1844, a French sentinel was attacked by the natives; the French determined to make Mr. Pritchard responsible for this act. Accordingly, on the evening of the 5th of March, as Mr. Pritchard was leaving his house, he was seized by the Commandant of Police, with some soldiers, who hurried him off to prison, where he was kept in close confinement. The following paper was circulated in the French, English, and Tahitian languages:—

“French Establishment in Oceania.

“A French sentinel was attacked in the night of the 2nd to the 3rd of March. In reprisal, I have caused to be seized one Pritchard, the only daily mover and instigator of the disturbances of the natives. His property shall be answerable for all damage occasioned to our establishments by the insurgents; and if French blood is spilt, every drop shall recoil on his head.

“D'AUBIGNY,

“Commandant Particular to the Society Islands.

“Papiti, 3rd March.”

*At the intervention of Captain Gordon, of the British war-steamer *Cormorant*, Mr. Pritchard was released from prison, on [*244] condition that he should not be again landed on the Society Islands; without taking leave of his family, he was conveyed in the *Cormorant* to Valparaiso, where he embarked in the *Vindictive*, and was brought to England.

When the news of this outrage reached England, a natural feeling of indignation was loudly expressed; and the then Prime Minister, Sir Robert Peel, in his place in the House of Commons, declared that “a gross outrage, accompanied with gross indignity, had been committed upon Mr. Pritchard:” at the same time he stated, that as this act had not been done in consequence of any authority given for that purpose by the French Government, he entertained a strong hope that it would at once make the reparation, which Great Britain had a right to require.

In this expectation Sir Robert Peel was not disappointed. On the last day of the Session of the British Parliament, the 5th of September, he was enabled to state in the House of Commons, that the discussion between the two Governments, relative to the Tahitian affair, had been brought to an amicable and satisfactory termination. This was effected by the payment, on the part of the French Government, of a sum of money to Mr. Pritchard, as an indemnity or compensation for the outrage which had been offered to him by the French in the island of Tahiti.(h)

(h) Annual Register, vol. lxxxvi. (1844), pp. 260–1.

CCXLVIII. The privileges of Consuls, so far as they are derived from the country to which they are sent, are, generally speaking, an exemption from any personal tax, and generally from the liability to have soldiers quartered in their houses; and in cases where the ambassadors are absent, or non-resident, they have a right of access to the authorities of the State in which they reside. They are usually allowed to grant passports to subjects of their (the consuls') own country, living [*245] *within the range of their consulate, but not to foreigners. As a general rule,⁽ⁱ⁾ the muniments and papers of the consulate are inviolable, and under no pretext to be seized or examined by the local authorities.

CCXLIX. As a general rule, too, Consuls, in Christian countries, have no contentious jurisdiction over their fellow-countrymen, but simply a sort of voluntary jurisdiction—a power of arbitration (*jurisdiction arbitrale*) in disputes, more especially those relating to matters of commerce.^(k) Their functions must, in great measure, depend upon the municipal law of their own country. No contentious jurisdiction can, according to the doctrine laid down in a former chapter, be exercised over their fellow-countrymen without the express permission of the State in which they reside; and no Christian State has as yet permitted the criminal jurisdiction of foreign Consuls. But usage, and the rule adopted in most treaties, concede to the Consul the assistance of the local police when it may be necessary for the exercise of his functions over the seamen of merchant-vessels belonging to his own country.^(l)

CCL. It has been observed, that the institution of the consulate is a result of International Comity; and that the refusal to receive a foreign Consul is no breach of strict International Law. But a Consul, admitted [*246] without any express *stipulation, is entitled to the same privileges as his predecessors have enjoyed, upon the general principle mentioned in a former chapter, that every nation is presumed to follow custom and usage in its treatment of foreigners, and is bound to give previous warning of its intention, if it have any, of adopting a different course with respect to them.^(m) As a general rule, and in the absence of any treaty upon the subject, the Consul looks for his authority and functions to the diplomatic instrument, by which he is appointed to his

(i) Mr. Fynn, in his work on the British Consul Abroad, observes, (p. 17,) "A Consul, however, is distinguished from the merchants or inhabitants of the place where he is appointed to by various privileges, derived from treaties, or founded on usage. He is respected in a particular manner: on his arrival he is allowed a free entry for his furniture and baggage; he is exempt from the excise or inland duties on liquors and other articles of consumption, *for himself and family*; he is entitled to a seat on the Bench with the magistrates of the place, whenever he is obliged to appear at their assemblies; to act as *Counsel* for the subjects of his nation, in all cases of dispute between them and the natives of the place. He is exempt from lodging the military in his house; and is to be furnished with a *guard*, when he requires one, to aid and assist him in the maintenance of his authority over the subjects of his own country trading to where he is located; and all masters of vessels are to show him respect and obedience."

(k) De Martens, Dr. des Gens, i. 251.

(l) De Martens, ib., i. 287.

(m) Vattel, t. i. liv. ii. c. ii. s. 34. "Au défaut des traités, la coutume doit servir de règle dans ces occasions; car celui qui reçoit un Consul sans conditions expresses, est censé le recevoir sur le pied établi par l'usage."

office, to the *exequatur* which empowers him to exercise them, and to any modification which the particular law or custom of the country in which he is placed may apply to them;(*n*) and he must always remember, that the principal end and object of the consulate is to protect the external commerce and the national navigation of his own country in the rights secured to them by usage or treaty.

CCLI. Some nations permit, and others forbid their Consuls to trade; a trading Consul is, in all that concerns his trade, liable to the local authorities in the same way as any native merchant. In fact, sometimes natives of the locality itself in which consular services are required, are appointed Consuls; and thus are, at one and the same time, the subjects of the country in which they dwell, and the agents of a foreign State. Such an appointment is, perhaps, rightly pronounced, by a considerable living authority, to be objectionable in principle.(*o*) The prerogatives of such Consuls are very limited; the only exemptions which they appear to enjoy are from lodging soldiers and from personal service in the civic guards or militia.(*p*)

*CCLII. Such an appointment cannot, of course, be made [*247] without the sanction of the Sovereign, though a condition of this kind has sometimes formed the subject of an express provision of a treaty. Thus, in the Treaty of 1753, between the Crown of the Two Sicilies and the Republic of Holland, it is provided:—

“L'on fera attention, de part et d'autre, de nommer pour Consuls dans les Etats respectifs, comme ci-dessus, des propres sujets naturels; et si l'une des parties contractantes nommait pour son Consul, dans les Etats de l'autre, un sujet de celle-ci, il sera libre à cette dernière de l'admettre, ou non.”(*q*)

CCLIII. Consuls-General are sometimes appointed. These officers exercise their functions over several places, and sometimes a whole country; and, generally speaking, Consuls and Vice-Consuls are under their control.

CCLIV. The appointment of Vice-Consuls is also sanctioned by the practice of nations.

English Vice-Consuls are usually appointed by the Consul, subject to the approbation of the Foreign Secretary of State, and, as a general rule, the English Vice-Consul corresponds directly with the Consul; but in special cases with the Foreign Secretary, in the first instance.(*r*)

CCLV. The Treaties which have reference to this subject appear to admit of the following classification:—

1. Treaties between Christian European States.
2. Treaties between Christian European States and the States of North and South America.
3. Treaties between the States of North and South America.
4. Treaties between Christian States and Infidel or Heathen States.

(*n*) De Martens, *ib.* i. 260–5.

(*o*) De Martens et De Cussey, *Rec. de Trait. Index Explicatif*, p. xxx. tit. Consuls, “Usage déplorable en principe.”

(*p*) De Martens, *Le Guide Diplomatique*, i. 393.

(*q*) Wenck. *Codex Jur. Gent.* t. ii. p. 775

(*r*) Fynn, p. 6.

The Treaties which principally illustrate the functions, powers, and privileges, of Consuls are, according to the above-mentioned classification, the following :

[*248] 1. Treaties between Christian European States.

- **France* with Spain, 1768-1769.
- “ with Great Britain, 1787.
- “ with the Netherlands, 1840.
- “ with Russia, 1787.
- “ with Portugal, 1667, 1797.
- Austria* with Spain, 1725.
- “ with Greece, 1835.
- Denmark* with Spain, 1641, 1742.
- “ with Russia, 1782.
- Kingdom of the Two Sicilies* with the Netherlands, 1753.
- “ “ “ with Russia, 1787.
- “ “ “ with Sweden, 1742.
- Prussia* with Portugal, 1844.
- Great Britain* with France, 1787 (*vide antè.*)
- “ with Portugal, 1840.
- “ with Russia, 1843.
- “ with Spain, 1665, 1667, 1751.
- Spain* with the Netherlands, 1714, 1816.
- “ with Great Britain (*vide antè.*)

2. Treaties between the States of North and South America and Christian European States.

a. North America:—

- United States of North America* with France, 1788, 1800.
- “ “ with Denmark, 1826.
- “ “ with Spain, 1795, 1819.
- “ “ with Great Britain, 1806.
- “ “ with Prussia, 1828.
- “ “ with Sweden, 1816, 1827.
- “ “ with Austria, 1829.

β. South America:—

- Mexico* with France, 1827.
- “ with Great Britain, 1826.
- “ with the Netherlands, 1827.
- New Grenada* with France, 1840.
- Brazil* with Denmark, 1828.
- “ with Great Britain, 1827.
- “ with Prussia, 1827.

[*249] **Texas* with France, 1839.

Rio de la Plata with Great Britain, 1825.

3. Treaties between the States of North and South America.

Central America with the United States, 1825.

Columbia with the United States, 1824.

4. Treaties between Christian States and Infidel or Heathen States.

Morocco with France, 1682, 1767.

“ with Denmark, 1767.

Morocco with Spain, 1799.

“ with United States of North America, 1786, 1830.

“ with Great Britain, 1826.

“ with the Netherlands, 1683, 1752.

The Ottoman Porte with France, 1535, 1569, 1584.

“ with the Two Sicilies, 1740.

“ with Spain, 1782.

“ with United States of North America.

“ with Great Britain, 1675.

Tunis with Denmark, 1751.

“ with Spain, 1794.

“ with United States of North America, 1797.

Tripoli with the Two Sicilies, 1754, 1816.

“ with Spain, 1784.

“ with United States of North America, 1805.

“ with Great Britain, 1662, 1675, 1694, 1716, 1754.

Persia with France, 1708, 1715, 1808.

China with Great Britain, 1843.

CCLVI. From these Treaties the general usage of nations with respect to the condition and authority of Consuls, both in Christian and Infidel countries, may be collected. It may be useful to mention further that those Treaties which most fully illustrate the usual and ordinary *status* of Consuls, as distinguished from their extraordinary privileges in Turkey *and the Levant, are the following, viz.:—The Treaty between Sicily and the Netherlands in 1753, and more particu- [*250]
larly the 31st article.(s)

The “Convention entre la Cour d’Espagne et celle de France, pour mieux régler les fonctions des Consuls et Vice-Consuls de ces deux Couronnes dans leurs Ports et Domaines respectifs” of 1769.(t)

The Consular Convention between the United States of North America and France, in 1788.

The Treaty between France and the Republic of Texas, in 1839.(u)

(s) Wenck. ii. 774–5.

(t) By the 12th Article of this Treaty it is provided, “Tous les différends et procès entre les sujets de l’une des parties contractantes sur le territoire de l’autre, et notamment tout ce qui concerne les gens de mer, seront jugés par les Consuls respectifs, sans qu’aucun officier territorial puisse intervenir, et que les appels des jugemens consulaires seront portés devant les tribunaux du pays qui a institué les Consuls, lesquels tribunaux pourront seuls en connaître.”

(u) Martens, Rec. de Traités, &c., 1830-39, vol. xxiv. p. 990.

“Art. 9. Les Consuls, Vice-Consuls, et agens consulaires respectifs, ainsi que leurs chanceliers, jouiront, dans les deux pays, des privilèges généralement attribués à leurs charges, tels que l’exemption des logemens militaires, et celle de toutes les contributions directes, tant personnelles que mobilières ou somptuaires, à moins, toutefois qu’ils ne soient citoyens du pays, ou qu’ils ne deviennent, soit propriétaires, soit possesseurs de biens immeubles, ou, enfin, qu’ils ne fassent le commerce, dans lesquels cas ils seront soumis aux mêmes taxes, charges et impositions que les autres particuliers. Ces agens jouiront en outre de tous les autres privilèges, exemptions et immunités qui pourront être accordés, dans leurs résidences, aux agens du même rang de la nation la plus favorisée.

10. “Les archives, et en général tous les papiers des chancelleries des consulats respectifs, seront inviolables, et sous aucun prétexte, ni dans aucun cas, ils ne pourront être saisis ni visités par l’autorité locale.

[*252]

*CHAPTER III.

CONSULS—DUTIES AND POWERS OF.

CCLVII. It will not be inconsistent with the scheme of this work to call attention to some of the principal domestic regulations of particular States upon the duties and powers of Consuls. The law of the United States of America upon a subject in which they have so deep and legitimate an interest, is thus stated by Mr. Chancellor Kent:—

“The Laws of the United States, on the subject of Consuls and Vice-Consuls, specially authorise them to receive the protests of masters and others relating to American commerce, and they declare that Consular Certificates, under seal, shall receive faith and credit in the Courts of the United States. It is likewise made their duty, where the laws of the country permit, to administer on the personal estates of American citizens, dying within their consulates, and leaving no legal representative, and to take charge of and secure the effects of stranded American vessels, in the absence of the master, owner, or consignee; and they are bound to provide for destitute seamen within their consulates, and to send them at the public expense, to the United States. It is made the duty of American Consuls and commercial agents to reclaim deserters, and discountenance insubordination, and to lend their aid to the local authorities for that purpose, and to discharge seamen cruelly treated. It is also made the duty of masters of American vessels, on arrival at a foreign port, to deposit their registers, sea-letters and passports with the Consul, Vice-Consul, or commercial agent, if any, at the port; though this injunction only

11. “Les Consuls, Vice-Consuls, et agens consulaires respectifs, auront le droit, au décès de leurs nationaux morts, sans avoir testé ni désigné d'exécuteurs testamentaires, de remplir, soit d'office, soit à la réquisition des parties intéressées, en ayant soin de prévenir d'avance l'autorité locale compétente, les formalités nécessaires, dans l'intérêt des héritiers, de prendre en leur nom possession de la succession, de la liquider et administrer, soit personnellement, soit par des délégués, nommés sous leur responsabilité.

12. “Les Consuls, Vice-Consuls, et agens consulaires respectifs seront exclusivement chargés de la police interne des navires de commerce de leur nation, et les autorités locales ne pourront y intervenir qu'autant que les désordres survenus seraient de nature à troubler la tranquillité publique, soit à terre, soit à bord d'autres bâtimens.

13. “Les Consuls, Vice-Consuls, et agens consulaires respectifs pourront faire arrêter et renvoyer, soit à bord, soit dans leurs pays, les matelots qui auraient déserté des bâtimens de guerre ou de commerce appartenant à leur nation. A cet effet ils s'adresseront par écrit aux autorités locales compétentes, et justifieront, par l'exhibition des registres du bâtiment ou du rôle d'équipage, ou, si ledit navire était parti, par copie desdites pièces, dûment certifiées par eux, que les hommes qu'ils réclament faisaient partie dudit équipage. Sur cette demande, ainsi justifiée, la remise ne pourra leur être refusée. Il leur sera de plus donné toute aide et assistance pour la recherche, saisie et arrestation desdits déserteurs, qui seront même détenus et gardés dans les prisons du pays, à la requête et aux frais des Consuls, jusqu'à ce que ces agens aient trouvé une occasion de les faire partir. Si pourtant cette occasion ne se présentait pas dans un délai de quatre mois, à compter du jour de l'arrestation, les déserteurs seraient mis en liberté, et ne pourraient plus être arrêtés pour la même cause.”

applies when the vessel shall have come to an entry, or transacted business at the port. These particular powers *and duties are similar to those prescribed to British Consuls, and to Consuls under [*253] the consular convention between the United States and France, in 1788; and they are in accordance with the usages of nations, and are not to be construed to the exclusion of others, resulting from the nature of the consular appointment. The consular convention between France and this country, in 1778, allowed Consuls to exercise police over all vessels of their respective nation, 'within the interior of the vessels,' and to exercise a species of civil jurisdiction, by determining disputes concerning wages, and between the masters and crews of vessels belonging to their own country. The jurisdiction claimed under the consular convention with France was merely voluntary, and altogether exclusive of any coercive authority; and we have no treaty at present which concedes even such consular functions. The doctrine of our courts is, that a foreign Consul, duly recognised by our Government, may assert and defend, as a competent party, the rights of property of the individuals of his nation, in the courts of the United States, and may institute suits for that purpose, without any special authority from the party for whose benefit he acts. But the Court, in that case, said that they could not go so far as to recognise a right in a Vice-Consul to receive actual restitution of the property, or its proceeds, without showing some specific power for the purpose from the party in interest." (a)

CCLVIII. The authority and powers entrusted by the British Government to their Consuls are to be found:—

1. In certain general institutions issued in 1846 by the Secretary of State for the Foreign Department. Of these the following only require to be noticed in this work:—

"SEC. 1. *Exequatur*.—Upon the arrival of the Consul at his post, he will announce himself to the principal public authorities, and will show them Her Majesty's Commission *or a copy thereof; and he may [*254] if required, give them a copy, stamped with the consular seal.

"The original Commission should be forwarded to Her Majesty's Ambassador or Minister at the Court of the country in which the Consul has to reside, with a request that the said Ambassador or Minister will apply to the proper authorities for the usual exequatur to enable him to enter officially upon his consular duties.

"SEC. 2. *Privileges*.—Her Majesty's Commission and the exequatur will secure to the Consul the enjoyment of such privileges, immunities, and exemptions, as have been enjoyed generally by his predecessors, and as are usually granted to Consuls in the country in which he resides; and he will be cautious not to aim at more.

"SEC. 7.—*Advice and assistance to be given to British subjects*.—The Consul will give his best advice and assistance, when called upon, to Her Majesty's trading subjects, quieting their differences, promoting peace, harmony, and good-will amongst them; and conciliating, as much

as possible, the subjects of the two countries upon all points of difference which may fall under his cognizance.

“In the event of any attempts being made to injure British subjects, either in their persons or property, he will uphold their rightful interests, and the privileges secured them by treaty, by due representation in the proper official quarter. He will, at the same time, be careful to conduct himself with mildness and moderation in all his transactions with the public authorities; and he will not, upon any account, urge claims on behalf of Her Majesty’s subjects to which they are not justly and fairly entitled. If redress cannot be obtained from the local administration, or if the matter of complaint be not within their jurisdiction, the Consul will apply to Her Majesty’s Consul-General, or to Her Majesty’s Minister, if there be no Consul-General in the country wherein he resides, in order that he may make a representation to the higher authorities, or take such other steps in the case as he may think proper; and the Consul *will pay strict attention to the instructions which he may [*255] receive from the Minister or Consul-General.

“SEC. 10. *Protection on board of British ships.*—Misconception having arisen with respect to the degree of protection which commanders of British ships may afford to any individuals seeking refuge on board of those ships, the Consul is informed that the commanders of British ships lying in the ports of a foreign country are not authorized to harbour any persons (even if British subjects) who may seek refuge on board of their vessels, in order to evade or resist the due execution of the laws, to which, by reason of their residence in the country, they have rendered themselves amenable; and the Consul will bear in mind, in all applications which may be made to him on behalf of individuals so circumstanced, that such persons are liable to be taken by due process of the laws of the country.

“SEC. 16. *Certificates.*—The Consul will be careful not to grant a certificate of any fact of which he has not accurately ascertained the truth; and whenever, he is required to attest or certify a document consisting of more than one sheet, he will unite the sheet by a tape or ribbon to the end of the document, by means of wax or wafer, on which he will place his official seal.

“SEC. 24. *Precedence between Consuls and Naval Officers.*—In order to avoid the inconvenience which has arisen to Her Majesty’s service from a difference of opinion on a point of etiquette between Her Majesty’s Consuls and the Commanders of Her Majesty’s ships of war arriving at foreign ports with respect to the payment of the first visit, it has been decided that whenever the captain of one of Her Majesty’s ships of war, being a post-captain or a commodore, wearing a blue pendant, shall signify to the Consul, in writing, his arrival at the port at which the Consul resides, the Consul (or Vice-Consul in ports where there is a Consul-General) will take the earliest opportunity of waiting in person on the commander of the ship, and of affording him such assistance as [*256] he may require. Commanders *of Her Majesty’s navy will, on their arrival at any such ports, wait upon Her Majesty’s Consuls, but they will be waited upon by Vice-Consuls. Consuls-General and

Consuls will, in all cases, wait upon flag-officers and commanders wearing a red or white pendant, without waiting for any previous communication. The officers commanding Her Majesty's ships of war have orders to furnish a boat to convey the Consul on board, and to re-land him, on the Consul notifying his wish to have a boat so sent for him. The Consul will strictly attend to the foregoing instructions. The copy of a memorandum upon this subject, issued by the Admiralty to Her Majesty's naval officers, is herewith enclosed.

"SEC. 27. *Vice-Consuls*.—In case it shall appear to the Consul necessary that a Vice-Consul should be stationed at any port within his district, where no British vice-consulate has heretofore existed, or wherever a vacancy shall occur, he will report the fact to the Secretary of State, showing at the same time how far British interests require such an appointment; and if suggested as expedient, he will submit the name of some English merchant of respectability for the appointment, with the grounds of his recommendation; but he will in no case give him any commission or sanction to act in that capacity, until the approval of the Secretary of State shall have been given. Upon the receipt of such approval, the Consul will acquaint the individual with his appointment as Vice-Consul, and will furnish him with the necessary authority to act in that capacity, together, with instructions for the guidance of his conduct conformable to those which he himself is acting."

The Consul is ordered not to dismiss any Vice-Consul acting within his district without the sanction of the Secretary of State; but if he should be of opinion that good and sufficient grounds exist for the dismissal of a Vice-Consul, he will give information thereof to Her Majesty's Secretary of State, suspending, provisionally, the Vice-Consul, only when the extraordinary nature of the case may appear to require so *prompt a proceeding; and awaiting, in all cases, the decision of the Secretary of State, previously to taking ulterior proceedings upon the subject. [*257]

At the close of every year, it is the duty of the Consul to transmit to the Secretary of State a list (according to a prescribed form)(b) of all persons who may be acting within his consular district, and under his jurisdiction, either as British Vice-Consuls, Deputy Consuls, Provisional Consular Agents, or in any other similar capacity; stating in such return the station, the name of the individual, his consular rank, the date of his provisional nomination, and the date of the approval thereof by the Secretary of State.

"SEC. 29. *Passports*.—The Consul will not take upon himself, as a matter of course, to grant passports. If, however, the regulations of the country wherein he resides require that his visa should be affixed to the passport of British subjects, or that a certificate should be furnished by him, to enable them to obtain passports from the proper authorities, he will, when called upon, affix such visa, or give such certificates."(c)

An Order in Council regulating the consular fees issued in 1851.

CCLIX. The authority and powers of British Consuls are also to be

(b) Which is annexed to the statute.

(c) Fynn's British Consuls' Handbook, pp. 36–55.

found in the statute passed in the sixth year of George IV.; (*d*) and also in the statute passed in the sixth year of George IV. (chapter 78) relating to the performance of quarantine. (*e*)

In the statute of the 12th and 13th of Victoria (chapter 62) great [*258] powers are given to Consuls for the purpose of facilitating *the marriage of British subjects resident in foreign countries.

The statute of the 7th and 8th Victoria, chapter 112, (*f*) commonly called "The Merchant Seamen's Act," contained various provisions relating to Consuls and Vice-Consuls. This statute did not apply to any ship registered in or belonging to any British colony having a legislative assembly, or the crew of any such ship while it was within the precincts of the colony; but it did apply to every ship belonging to any colony or possession of the British Crown, when proceeding from one part of the United Kingdom to another (including the islands of Jersey, Guernsey, Alderney, Sark, and Man,) or from any port in the United Kingdom to any port of any foreign power, or to any colony to which the ship did not belong.

This statute was followed by one passed in 1854 (the 17th and 18th Vict. c. 104,) called the "Merchant Shipping Act," and which is in fact a code of British mercantile and marine law; it embodies and extends the provisions of the former statute, and contains a variety of important provisions with respect to the powers and duties of British Consuls over the commercial marine of Great Britain: the sections which principally relate to this subject are mentioned in the note appended to these observations. (*g*)

CCLX. The most instructive and remarkable of the Regulations respecting Consuls, promulgated by Foreign Powers for the direction of their subjects, appear to be the following: (*h*)—Those put forth by Spain in 1745, 1817, 1818, 1827; by France, (*i*) "Ordonnances" respecting

(*d*) Chapter 87. "To regulate the Payment of Salaries and Allowances to British Consuls at Foreign Ports, and the Disbursements at such Ports for certain Public Purposes."

(*e*) In this statute the clauses which extend from the tenth to the fifteenth relate to provisions for the support of churches and chapels in foreign ports and places where a chaplain is appointed and maintained by subscription.

(*f*) Sec. 61.

(*g*) Ss. 13, 31, 46, 52, 53, 54, 80, 81, 83, 103, 104, 105, 158, 192 to 211, inclusive; 219, 220, 221, 227, 230, 246, 257 to 267, inclusive; 276, 483 to 494, inclusive.

(*h*) De Martens, *ib.* 331-2, recommends them as "les plus indispensables à connaître ou à consulter."

(*i*) In the Code de Commerce are these provisions:—

"234. Si pendant le cours du voyage, il y a nécessité de radoub, ou d'achat de victuailles, le capitaine, après l'avoir constaté par un procès-verbal signé des principaux de l'équipage, pourra, en se faisant autoriser en France par le tribunal de commerce, ou à défaut, par le juge de paix, chez l'étranger par le consul français, ou à défaut, par le magistrat des lieux, emprunter sur le corps et quille du vaisseau, mettre en gage ou vendre, des marchandises jusqu'à concurrence de la somme que les besoins constatés exigent.

"Les propriétaires, ou le capitaine qui les représente, tiendront compte des marchandises vendues, d'après le cours des marchandises de même nature et qualité dans le lieu de la décharge du navire, à l'époque de son arrivée.

"244. Si le capitaine aborde dans un port étranger, il est tenu de se présenter au consul de France, de lui faire un rapport et de prendre un certificat constatant

Consuls in *Christian countries, published in 1833, 1845; [*259] respecting Consuls in Barbary and the "*échelles du Levant*," those published in 1836. Those put forth by Sardinia in 1835; by Prussia(*k*) in 1796, and in the years immediately following; by Brazil in 1834; by Denmark in 1824; by the United States of North America in 1833; by Russia in 1820; by Greece in 1834.(*l*)

*CHAPTER IV.

[*260]

DECISIONS OF MUNICIPAL TRIBUNALS AS TO CONSULS.

CCLXI. A CONSUL being a person impressed with a public character is "entitled" (as Lord Ellenborough says) "to privilege to a certain extent, such as for safe conduct; and if that be violated, the sovereign has a right to complain of such violation."(*a*)

Vattel complains that Wicquefort, in his Treatise on Ambassadors, denies to Consuls the *jus gentium*, while he cites instances which support their claim to it. But these instances when examined do not sustain the assertion of Vattel.(*b*)

CCLXII. The Governor of Cadiz having arrested and insulted the Dutch Consul, the United States complained to the Court of Madrid on the ground that the "*jus gentium*" had been violated, and not on the ground that specific treaties, which was their real vantage ground, had been disregarded by these acts.

The Dutch also made a fruitless endeavour to obtain the privilege of an Ambassador for their Consul at Genoa, but the Senate refused their claim, replying: "Qu'ils ne le reconnoissent point pour Ministre Public; et que tout ce qu'on pouvoit désirer d'eux, c'estoit la jouissance paisible des droits et des privilèges, que la coustume attribue à cette sorte d'emplois. Les Consuls ne sont que des marchands, qui avec leur charge de juge des différends, qui peuvent *naistre entre ceux de leur nation, ne laissent pas de faire leur trafic, et d'estre sujets à la [*261] justice du lieu de leur residence, tant pour le civil que pour le criminel; ce qui est incompatible avec la qualité de Ministre Public."(*c*)

In 1634 a quarrel took place between the Republic of Venice and the Papal Government, on account of divers flagrant and indefensible outrages committed by the Governor of Ancona against the property and persons of the Consuls of the Republic, seizing the papers and goods of one, and imprisoning the person of the other, upon suspicions wholly unsupported by proof. The Ambassador of France interfered to mediate

l'époque de son arrivée et de son départ, l'état et la nature de son chargement."—
L. ii. t. iv.

(*k*) See Manuel Pratique des Consulats, by De Mensch.

(*l*) See these translated into French, in a note to p. 245, of De Martens, *Le Guide Diplomatique*, t. i.

(*a*) *Viveash v. Becker*, 3 Maule & Selwyn, (Q. B. Rep.,) 297. Vide post.

(*b*) Wicquefort, *L'Ambassadeur et ses Fonctions*, l. i. s. v. p. 63.

(*c*) Wicquefort, l. i. s. v. p. 62.

between the parties. But these were cases in which the Government of Venice would have resented the injury, if one of their private citizens had been the subject of it; and Wicquefort's position with respect to the *status* of Consuls is, "*Les Princes qui les employent les protègent, comme personnes qui sont à leur service et comme tout bon maistre protège son serviteur et son domestique; mais non comme Ministres Publics.*"(d)

And it is with the instances cited by Wicquefort before his eyes that Bynkershoek, not disposed, it must be presumed, to lower the dignity of his country, remarks: "*Et, si verum amamus, Consules illi non sunt nisi Mercatorum Nationis suæ defensores et quandoque etiam judices, quin fere ipsi Mercatores, non missi, ut principem suum representent apud alium principem, sed ut principis sui subditos tucantur in iis, quæ ad mercaturam pertinent, sæpe et ut de iis inter eos jus dicant.*"(e)

CCLXIII. In France the law has been very correctly laid down.

In September, 1842, the Cour Royale de Paris confirmed, on appeal, the judgment of the Tribunal Civil de la Seine, in *the matter of [262] M. Carlier d'Abaunza, Marquis de la Fuente Hermosa.

The Marquis was a Spaniard by birth, and had lived in Paris since 1833. In 1840 he had been nominated Consul-General of the Republic of Uruguay; but had not obtained the exequatur of the French Government. He was arrested by a creditor and claimed exemption from civil process on the ground of his diplomatic character. But the French Courts decided that the Consul had no diplomatic mission, and was not entitled to the immunities of an ambassador, under any circumstances, and that this proposition was still more certain when the Consul had not received the exequatur of the government of the country in which he was residing.(f)

The Cour Royale of Aix, in the year 1843, gave the following decision in the case of M. Soller:—

"Attendu que si les Ambassadeurs sont indépendants de l'autorité souveraine du pais dans lequel ils exercent leur ministère, ce privilège n'est pas applicable aux Consuls;

"Que ceux-ci ne sont que des agents commerciaux; que si les lois de police et de sécurité obligent en général tous ceux qui habitent le territoire français, il en résulte que l'étranger, qui se trouve même casuellement sur ce territoire, doit concourir de tous les moyens à faciliter l'exercice de la justice criminelle;

Attendu que si la convention diplomatique dont le Consul d'Espagne se prévaut pour être dispensé de venir déposer devant la cour était sans inconvénient pour le tems où elle fut faite, alors que la procédure criminelle était secrète, elle est inapplicable aujourd'hui où d'après le droit public qui nous régit les débats sont publiques, et où les temoins sont tenus de déposer oralement devant le jury;

(d) Ibid. p. 63.

(e) Bynkershoek, Opera, vol. vi. p. 482. De Foro Legatorum, c. x.

(f) Gazette des Tribunaux (Numero 4809,) Lundi 5 et Mardi 6 Septembre, 1842. Ib. (Numero 4783) Samedi 6 Août, 1842.

See also the case of Hermann Delong. Ib. (Numero 4890) Dimanche, 9 Mai, 1841.

*“ Mais attendu que le Consul est étranger ; qu’il a pu ignorer l’économie et le mécanisme de la procédure criminelle française, [*263] et qu’il y a de la bonne foi dans son refus ;

“ La cour déclare n’y avoir lieu à condamner M. Soller à l’amende.”(g)

CCLXIV. The civil tribunals of the United States of North America have promulgated the same doctrine.

CCLXV. In England the *status* of Consuls has more than once been brought under discussion in the Courts which administer Municipal Law.

In the tenth year of the reign of George II. (1737,) the following case was brought before Lord Chancellor Talbot :

Barbuit's Case in Chancery.(h)

Barbuit had a commission, as Agent of Commerce from the King of Prussia, to Great Britain, in the year 1717, which was accepted here by the Lords Justices when the King was abroad. After the late King's demise, his commission was not renewed until 1735, and then it was, and allowed in a proper manner ; but with a recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern, and not to the King ; and his business described in the commissions was, to do and execute what his Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain ; to present letters, memorials, and instruments concerning trade, to such persons, and at such places, as should be convenient, and to receive resolutions thereon ; and thereby his Prussian Majesty required all persons to receive writings from his hands, and give him aid and assistance. Barbuit lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an Ambassador or foreign minister, to be free from arrest.

*After hearing council on this point,—

The Lord Chancellor said :—“ A Bill was filed in this Court [*264] against the defendant in 1725, upon which he exhibited his cross bill, styling himself merchant. On the hearing of these causes the cross bill was dismissed ; and in the other, an account decreed against the defendant. The account being passed before the Master, the defendant took exceptions to the Master's report, which were overruled ; and then the defendant was taken upon an attachment for non-payment, &c. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet, if the defendant is truly a public minister, I think he may now insist upon it ; for the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents ; and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private per-

(g) Heffters, s. 226, note. De Martens, *Le Guide Diplomatique*, t. i. p. 298.

(h) Cases in Equity under Lord Talbot, p. 281.

sions, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for the sake of the business he is to do, it is impossible that he can renounce such privilege and protection; for by his being thrown into prison the business must inevitably suffer. Then the question is, whether the defendant is such a person as 7 Anne, cap. 10, describes; which is only declaratory of the ancient universal *jus gentium*. The words of the statute are *Ambassadors or other public Ministers*, and the exception of persons *trading* relates only to their servants: the Parliament never imagining that the ministers themselves would trade. I do not think the words *Ambassadors or other public Ministers* are synonymous. I think that the word *Ambassadors*, in the Act of Parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called *Ambassadors Extraordinary*; and public

[*265] *Ministers*, in the Act, take in all others who constantly reside here: and both are entitled to these privileges. The question is, whether the defendant is within the latter words. It has been objected that he is not a public minister, because he brings no credentials to the King. Now, although it be true that this is the most common form, yet it would be carrying it too far to say that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be employed about State affairs. In which case, if State affairs are used in opposition to commerce, it is wrong: but if only to signify the business between nation and nation, the proposition is right; for trade is a matter of State, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong; and it is of no weight with me that the defendant was not to concern himself about other matters of State, as if he was authorized as a public minister to transact matters of trade. It is not necessary that a Minister's commission should be general to entitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every *Ambassador Extraordinary* is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is entrusted to transact affairs between the two crowns: the commission is, to assist his Prussian Majesty's subjects here in their commerce, and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King, which makes his employment to be in the nature of a Consul. And although he is called only an Agent of Commerce, I do not think the name alters the case. Indeed, there are some circumstances that put him below a Consul; for he wants the power of judicature which is commonly given to Consuls. Also their commission is usually directed to the prince of the country,

[*266] *which is not the present case; but at most he is only a Consul. "It is the opinion of Barbeyrac, Wicquefort, and others, that a Consul is not entitled to the *jus gentium* belonging to Ambassadors. And as there is no authority to consider the defendant in any other view

than as a Consul, unless I can be satisfied that those acting in that capacity are entitled to the *jus gentium*, I cannot discharge him."

CCLXVI. In 1764, the case *Triquet and others v. Bath*(*i*) came before King's Bench, and the great Lord Mansfield referred to the case of *Barbuit* in which he had been counsel, and said that neither Lord Talbot, nor Lord Holt, nor Lord Hardwicke ever doubted that the Law of Nations was part of the Law of England. This case related to the privileges of a Secretary of a Foreign Ambassador.

In 1767, the case of *Heathfield v. Clifton*(*k*) came before the King's Bench, in which also the privileges of the Ambassador's retinue were discussed, and Lord Mansfield said:—"The privileges of public ministers and their retinue depend upon the Law of Nations, which is part of the Common Law of England. And the Act of Parliament of 7 Anne, c. 12, did not *intend* to alter, nor *can* alter, the Law of Nations. His Lordship recited the history of that Act, and the occasion of it, and referred to the annals of that time. He said, there is not one of the provisions in that Act which is not warranted by the Law of Nations.

"The Law of Nations will be carried as far in England as anywhere, because the Crown can do no particular favours affecting the rights of suitors, in compliment to public ministers, or to satisfy their points of honour.

"The Law of Nations, though it be liberal, yet does not give protection to screen persons who are not bona fide servants to public ministers, but only make use of that *pretence, in order to prevent their [*267] being liable to pay their just debts.

"The Law of Nations does not take in Consuls, or agents of commerce, though received as such by the courts to which they are employed. This was determined in *Barbuit's* case, which was solemnly argued before and determined by Lord Talbot, on considering and well weighing *Barbeyrac*, *Bynkershoek*, *Grotius*, *Wicquefort*, and all the foreign authorities (for there is little said by our own writers on this subject.")

CCLXVII. In 1808, the case of *Clarke v. Cretico*(*l*) came before the Common Pleas. The defendant claimed exemption from arrest, on the ground of being Consul-General of the Sublime Porte; and the authority of *Vattel* was much urged on his behalf, as well as the doctrine laid down by Lord Mansfield in the case just cited, that the Law of Nations was part of the Law of England. In this case of *Clarke v. Cretico*, Sir James Mansfield, Chief Justice, said:—"It has not been clearly proved that the defendant held the office of Consul at the time of the arrest. The general question is undoubtedly of importance; but it is not necessary that the Court should come to any determination upon it at present. The office of Consul is indeed widely different from that of an Ambassador; but still the duties of it cannot be performed by a person in prison. Yet I should have some difficulty in deciding in opposition to *Wicquefort*, who is an authority of great weight, and without any determination upon the question (for in the case before Lord Talbot there was no decision,) that a Consul is entitled to this privilege. The words of the statute are,

(i) 1 Taunton, 107.

(l) 3 Burrows, 1481.

(k) 4 Burrows, 2016.

‘Ambassador or other public Minister.’ But a Consul is certainly not a public minister. Let the case stand over till it shall be ascertained by further evidence whether the appointment of the defendant has been revoked.”

[*268] *Afterwards an affidavit was produced, by which it appeared that the defendant had been dismissed from his office in the month of December, 1806, and the rule was discharged.

CCLXVIII. Lastly, in the case of *Viveash v. Becker*,^(m) which in 1814 came before the King’s Bench, Lord Ellenborough decided that a resident merchant in London, who had been appointed and had acted as Consul to the Duke of Oldenburg, was not privileged from arrest. In this case Lord Ellenborough, having reviewed the preceding cases, and the doctrine of *Wicquefort* and *Vattel*, concluded his judgment in these words:—“Nobody is disposed to deny that a Consul is entitled to privileges to a certain extent, such as for safe conduct; and if that be violated, the Sovereign has a right to complain of such violation. This consideration disposes of the authority which was endeavoured to be derived from that case. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the Act of Parliament, which mentions only ‘Ambassadors and public Ministers,’ and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory not only of what the Law of Nations is, but of the extent to which that Law is to be carried. It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges. Thus a Consul might appoint a vice-consul in every port to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly which the crown could not grant directly. The mischief of this would be enormous. In this case it does not appear that the debt was not contracted before the time of the defendant’s having the character of Consul. If we saw clearly that the Law of Nations was in favour of the privilege, it would be afforded to the *defendant; and it would [*269] be our duty rather to extend than to narrow it. But we are of opinion that no such privilege exists, but that this defendant is, like every other merchant, liable to arrest.” Rule discharged.

CCLXIX. The English court⁽ⁿ⁾ has considered that a Consul resident abroad, and plaintiff in a suit, is exempt from the necessity of giving security for costs, to which necessity, by the general principle of International Law, the foreign plaintiff is subject.^(o)

CCLXX. Such being the doctrine of the municipal courts of Great Britain, it remains to notice the doctrine held by the tribunals of International Law in that country. The case of the *Indian Chief* came before the Prize Court in 1800. In this case a cargo seized as prize was sought to be exempted from the rights of the belligerent, upon the ground that it was the property of the American Consul at Calcutta. Lord Stowell

(m) 3 Maule & Selwyn, 297.

(n) *Colebrooke v. Jones*, 2 Vesey’s Rep. 154.

(o) *Félix*, l. ii. t. ii. c. 2. *Etranger Demandeur*.

said:—"On the part of the claimant many grounds have been taken. I am first reminded that he was American Consul, although it is not distinctly avowed that his consular character is expected to protect him; nor could it be with any propriety or effect, it being a point fully established in these Courts, that the character of Consul does not protect that of merchant united in the same person. It was so decided on solemn argument in the course of the last war by the Lords, in the cases of Mr. Gildermester, the Portuguese Consul in Holland, and of Mr Eykellenburg, Prussian Consul at Flushing. These cases were again brought forward to notice in the case of Mr. Fenwick, American Consul at Bourdeaux in the beginning of this war, on whose behalf a distinction was set up in favour of American Consuls, as being persons not usually appointed, as the Consuls of other nations are, from among the resident merchants of the foreign country, but *specially delegated from America, and sent to Europe on the particular mission, and continuing in Europe principally in a mere consular character. But in that case, as well as in the case of Sylvanus Bourne, American Consul at Amsterdam, where the same distinction was attempted, it was held that if an American Consul did engage in commerce, there was no more reason for giving his mercantile character the benefit of his official character, than existed in the case of any other Consul. The moment he engaged in trade, the pretended ground of any such distinction ceased: the whole of that question, therefore, is as much shut up and concluded as any question of law can be."(*p*)

CCLXXI. The same doctrine has been promulgated by the Prize Courts in the United States of America.(*q*)

*CHAPTER V.

[*271]

CONSULS IN THE LEVANT.(*a*)

CCLXXII. THE attributes and functions of the Consul have hitherto been considered with reference to the existence of their office in Christian countries; but by usage, practice and still more, by the express stipulations of treaty, they have obtained a very different *status* in Mahometan and indeed in Unchristian dominions. In these countries they have retained that general character of diplomatic representatives which they appear, from the sketch given at the beginning of this Chapter, to have in earlier times possessed everywhere, but of which, in Christian countries, they have subsequently been deprived.

(*p*) The Indian Chief, 3 Robinson's Ad. Rep. 26. The Josephine, 4 Robinson, 26. The President, 5 Rob. 277. The Falcon, 6 Rob. 197. The Hope and others, Dodson's Ad. Rep. 226, and note D. at the end of the volume. Albrecht v. Sussman, 2 Vesey & Beames' Chancery Reports, 323.

(*q*) American Reports:—Arnold v. United Insurance Company, 1 Johnson, 363. Griswold v. Washington, 16 Johnson, 346. Kent's Comment. vol. i. pp. 44–62.

(*a*) Papers laid before Parliament relating to the Jurisdiction of Her Majesty's Consuls in the Levant, 1845.

NOVEMBER, 1855.—13

CCLXXIII. In almost all the treaties which, of late years, have been entered into by European powers with Mahometan States, the power of criminal jurisdiction over the subject of the State which the Consul represents, has been stipulated for and conceded to that officer. In fact, Mahometan States have accorded to Europeans a privilege equivalent to that which they would have enjoyed from a concession of territory, viz., the privilege of preserving their natural right, and being subject to their national jurisdiction in a foreign territory.^(b) Consuls in the "*échelles du Levant*" receive, on the requisition of their Ambassador at Constantinople, letters-patent from the Porte, called a *Barat*, specifying their privileges and immunities.

[*272] *CCLXXIV. In England a corporation by the name of "The Governor and Company of Merchants of England trading in the Levant Seas" was created by letters-patent in James I.'s reign. These were confirmed by Charles II., and were the object of various statutes in the reigns of George II. and George III.; but in the sixth year of George IV. the possessions and property of the company were transferred to Government for the public service.^(c)

CCLXXV. In August, 1843, a very important English statute was passed (6 & 7 Vict. c. 94,) which recited that—

"Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions: and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed: Be it therefore enacted, &c., That it is and shall be lawful for Her Majesty to hold, exercise, and enjoy any power or jurisdiction which Her Majesty now hath, or may at any time hereafter have within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory.

"II. That every act, matter, and thing, which may at any time be done in pursuance of any such power or jurisdiction of Her Majesty, in any country or place out of Her Majesty's dominions, shall in all courts, ecclesiastical and temporal, and elsewhere within Her Majesty's dominions, be and be deemed and adjudged to be, in all cases, and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place."

CCLXXVI. In consequence of the provisions of this statute, two important Orders in Council were issued respecting *the civil^(d) and criminal^(e) jurisdiction of Her Majesty's Consuls in the Levant.^(f) In the memorandum put forth by the Foreign Office (July 2, 1844) for the guidance of the Consuls in the exercise of their jurisdiction,

(b) De Martens, *Le Guide Dipl.* i. 311, n.

(c) 6 Geo. IV. c. 23.

(e) 19th June, 1844.

(d) 2nd October, 1843.

(f) Fynn, pp. 174-8.

the grounds upon which it rests, and the general manner in which it should be exercised, are very clearly stated in the following language:—

“The right of British consular officers to exercise any jurisdiction in Turkey, in matters which in other countries come exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the Sultans of Turkey to the British Crown, and therefore the right is strictly limited to the terms in which the concession is made.

“The right depends, in the next place, on the extent to which the Queen, in the exercise of the power vested in Her Majesty by Act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects, and therefore the Orders in Council which may, from time to time, be issued, are the only warrants for the proceedings of the consuls, and exhibit the rules to which they must scrupulously adhere.

“This state of things in Turkey is an exception to the system universally observed among Christian nations. But the Ottoman emperors having waived in favour of Christian Powers rights inherent in territorial sovereignty, such Christian Powers, in taking advantage of this concession, are bound to provide, as far as possible, against any injurious effects resulting from it to the territorial sovereign; and as the maintenance of order and the repression and punishment of crime are objects of the greatest importance in every civilized community, it is obligatory upon the Christian Powers, standing as they do in Turkey, in so far *as their own subjects are concerned, in the place of the territorial sovereign, to provide as far as possible for these great ends.”(g) [*274]

CCLXXVII. Consuls residing in any of the five free ports (Canton, Amoy, Foo-chow-foo, Ningpo, Shanghai) established by the Treaty of Peace between Great Britain and China in 1842, have received, by the subsequent commercial Treaty of 1843, powers of a very extended character, requiring, in some respects, the exercise of judicial and executive functions. The thirteenth article of this Treaty contains the following provisions with respect to Consuls:—

“Whenever a British subject has reason to complain of a Chinese, he must first proceed to the consulate, and state his grievance. The Consul will thereupon inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If an English merchant have occasion to address the Chinese authorities, he shall send such address through the Consul, who will see that the language is becoming; and, if otherwise, will direct it to be changed, or will refuse to convey the address. If, unfortunately, any disputes take place, of such a nature that the Consul cannot arrange them amicably, then he

(g) Fynn, p. 20. Annual Register, vol. lxxxv. p. 370. Martens, Nouv. Rec. xxx. ii. p. 484. , lb. xxxvi. p. 418; see sections 12, 13, as to Subordinate Consuls and Consuls.

Vide ante, vol. i. pp. 83, and 501, (App.) for enumeration of the principal Treaties between Christian and Infidel States

shall request the assistance of a Chinese officer, that they may together examine into the merits of the case and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be [*275] empowered to put them in *force; and, regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nankin after the concluding of the Peace.”(h)

PART THE EIGHTH.

[*277]

*CHAPTER I.

RELIGION AND THE STATE.

CCLXXVIII. It was stated in an early part of this work,(a) that the International Status of Foreign Spiritual Powers, especially of the Pope, would require a distinct and separate consideration.

It is a subject to which very slight, if any, allusion is to be found in writings of the early International Jurists. Grotius mentions the donation of the Roman territory to the Popes,(b) and places among the “*unjust causes of war*” the papal claim of jurisdiction over all the nations of the earth;(c) and under the same head,(d) he evidently alludes to the division by Alexander VI. of the newly-discovered world (A. D. 1494), between the Crowns of Portugal and Castille,(e) perhaps, also to the donation by Pope Julius II. (A. D. 1512), of the kingdom of Navarre to Ferdinand of Arragon, because the lawful monarch (Jean d’Albret) had taken part with Louis XI. of France against the Pope and Ferdinand. Grotius does not specifically mention these instances, but the former, [*278] *at least, appears to have been present to his mind, when he speaks of the untenable position of those who assert the *jus Ecclesiæ* over nations occupying the hitherto unknown part of the earth.

(h) Annual Register for 1843, vol. lxxxv. p. 371.

The 6 Geo. 4, c. 87, which regulates the payments of salaries and allowances to British Consuls at foreign ports, and the disbursements at such ports for certain public purposes, contains various provisions relating to Churches and Chaplains attached to CONSULSHIPS; for by this Act the whole management of the funds and the regulation of the expenditure is under the control of the Consul, and not of the Ambassador; and by a strange anomaly, in those foreign Courts where there is an Ambassador and not a Consul (e. g., Berlin, Dresden, &c.,) there is no legislative provision for any chaplain at all.—Burns’s Eccles. Law (ed. Phillimore,) vol. i. p. 415, ggggg.

(a) Vol. i. ch. 2.

(c) II. 22, 14.

(e) See note of Gronovius.

(b) De J. B. et P., i. 3, 13.

(d) De J. B. et P., l. ii. c. xxii. 14.

Such pretensions are, he says, contrary to the letter and spirit of Scripture, to the example of our Saviour, from whom all Ecclesiastical power is derived, and to the opinion of the early Fathers of the Church. A bishop is required by St. Paul, among other things, not to be a smiter. To rule by human force belongs, says St. Chrysostom, not to bishops, but to kings. A bishop is to discharge his office *non cogendo sed persuadendo*, and, Grotius concludes, “ex his quidem satis apparet, Episcopos, quâ tales sunt, jus regnandi in homines humano more nullum habere; *Hieronymus Regem et Episcopum comparans: ille volentibus præest, hic nolentibus.*”(f)

Besides these allusions to this question of International Law, other observations, more or less bearing upon it, may be found in the work *De Jure Belli et Pacis*;(g) but the whole subject, in its mixed aspect both of International and Public Law, is dealt with by Grotius in a later work published after his death, and entitled, *De Imperio summarum potestatum circa sacra*. Bynkershoek(h) touches upon the authority of the Canon Law, and the difficulty which, on account of his double allegiance, might arise in the case of a delinquent Cardinal Ambassador; and in his *Quæstiones Juris Publici*, he has some chapters on the general subject, in which it is not unimportant, with reference to subsequent observations on this subject, to remark, that he carefully distinguishes between the cases of States which have, and those which have not an established Church.(i) D’Aguesseau has an elaborate dissertation(k) *upon the double allegiance of the Cardinal, which will be considered in a later chapter on this subject. Vattel has a chapter [*279] *De la Piété et de la Religion*,(l) which is not characterized by much force of reasoning or affluence of historical research, and which is chiefly concerned with considerations appertaining to Public Law. Later writers, especially Klüber, deal more systematically, though still very scantily, with the subject. More is to be found in such writers upon the general question of Religion in its connection with the State; but these observations seem generally to belong rather to the province of Public than of International Jurisprudence.(m) The question of the Right of Inter-

(f) See note of Gronovius, s. 14.

(g) Grotius refers to the authority of his fellow-countryman, Pope Adrian (*Adrianus noster, qui Cisalpinorum ultimus Pontifex Romanus sit*), as asserting, with probability, that subjects may consider whether the war of their government be just or not.—De J. B. et P., l. ii. c. 26, iv. 4.

(h) De Foro Leg. xii. 3–4, xxii. 4, xxiii. 4.

(i) “Quia Jus publicum etiam in Sacris consistit, ut admonet Ulpianus in l. i. s. 2, ff. d. Just. et Jur., inde rectè efficitur, Sacrorum quoque curam ad eum pertinere, ad quem pertinet summa totius Reipublicæ potestas. Scio, de eo argumento integris Libris esse disputatum in utramque partem, alios pro principe, alios pro Ecclesiæ suffragium dedisse, quin et esse, qui inter Jovem et Cæsarem imperium dividerint, sed quicquid illi dixerunt, dixerunt de *Religione jam constitutâ*, de *constituendâ* autem et verum est, et utile, eum, qui rerum civilium imperio potitur, etiam sacrorum esse potentem.”—Bynkershoek, Q. J. P., l. ii. c. xviii. et vide cc. xix. xx.

(k) Vide post.

(l) L. i. c. xii.

(m) E. g. De Rayneval, *Instit. de Droit de la Nature et des Gens*, c. 27. De la Religion et de Culte, De Martens, i. 208. Vattel, i. 316–20. Ger. Noodt, *Dissert. de Relig. ab Imperio, Jure Gentium, liberâ*. Bynkershoek, *De Cultu Religionis Peregrinæ apud veteres Romanos*.

vention on behalf of co-religionists, the subjects of a foreign kingdom, has been considered in the former volume of this work.⁽ⁿ⁾

CCLXXIX. It should be the object of the International Jurist to deal with this difficult subject, not in a theological, but in a strictly legal spirit. The line of demarcation between the two is often, indeed, very finely drawn, and it may not be always possible, especially in the historical narrative which necessarily introduces the law, to avoid trespassing in some degree upon what may appear, when regarded from one particular point of view, to be the exclusive domain of theology.

[*280] *But there is one rule, the observance of which is essential to the judicial discussion of this matter, namely, that an accurate statement of historical fact should precede the attempt to lay down any position or canon of International Law, upon the subject of the relations of Foreign Spiritual Powers with an independent State.

CCLXXX. It is proposed, in the following chapters, to treat of the whole subject in the following order:

1. General observations as to the right of the State to superintend, within its territorial limits, all religious doctrines taught, and the teachers of them.—The early connection of the Christian Church with the State.

2. The growth of the extraterritorial authority and pretensions of the Pope.

3. The *Corpus Juris Canonici*, the principles contained therein, and in subsequent Bulls, at variance with International Law.

4. The International Status of the Papacy, between the period of the promulgation of the Canon Law and the Council of Trent.

5. The period of the Council of Trent, and the effect of that Council upon International relations.

6. The International relations of the Papacy with Foreign States, in which a *Roman Catholic Church is established*, during the period between the Reformation and the present time.—The history of Concordata.

7. The International relations of the Papacy with Foreign States in which a *Protestant Church is established*.—*Bullæ Circumscriptionum*.

8. The International relations of the Papacy with Foreign States in which a *branch of the Catholic Church, not in communion with Rome, is established*.

9. The Electors, Ministers, and Courts of the Pope, considered in their relation to Foreign States.

10. The International Status of the Patriarch of Constantinople.

[*281]

*CHAPTER II.

GENERAL OBSERVATIONS AS TO THE RIGHT OF THE STATE TO SUPERINTEND, WITHIN ITS TERRITORIAL LIMITS, ALL RELIGIOUS DOCTRINES TAUGHT, AND THE TEACHERS OF THEM.—THE EARLY CONNEXION OF THE CHRISTIAN CHURCH WITH THE STATE.

CCLXXXI. "ITAQUE ex tot generibus nullum est animal præter

(n) Vol. i. pp. 470-482.

hominem, quod habeat notitiam aliquam Dei: ipsisque in hominibus nulla gens est, neque tam immansueta neque tam fera, quæ non etiamsi ignoret qualem habere Deum deceat, tamen habendum sciat." Such is the language of Cicero.(a)

The influence of this universal religious belief upon the character and conduct of citizens, has always brought the subject under the cognizance of the founders and the governors of States.(b) In this sense a great statesman and jurist has *observed: "La religion en général est du droit des gens."(c) The power exercised by those who claim [*282] to be the authorised expounders of the Divine Will over the minds of their disciples, is necessarily great, and frequently unlimited.

The reason of the thing required that persons and doctrines so intimately connected with the welfare of society should be in some degree subjected to the inspection and control of those who were responsible for it. Thus Grotius accurately observes, "Religio autem quanquam per se ad conciliandam Dei Gratiam valet, habet tamen et suos in societate humanâ effectus maximos. Neque enim immerito Plato religionem propugnaculum potestatis ac legum et honestæ disciplinæ vinculum vocat."(d)

CCLXXXII. Accordingly, to go back no further, we find that in most of the cities of Greece, and especially in Athens, the care of divine worship was committed to the magistrate who was often also the priest.(e)

Polybius singled out the religious instruction of the Romans(f) in-

(a) De Leg. i. c. viii. Cicero was deeply impressed with the truth, that the citizen who did not fear God could not adequately discharge any high or responsible office in the State, whether legal, or relating to the administration of public affairs. See what he says about the Epicureans, severely in the De Legibus, and jocosely in his Epistolæ:—"Sibi autem indulgentes et corpori deservientes atque omnia, quæ sequantur in vitâ, quæque fugiant voluptatibus et doloribus ponderantes . . . in hortulis suis jubeamus dicere, atque etiam *ab omni societate reipublicæ, cujus partem nec nôrunt ullam, nec unquam nosse voluerunt, paullisper facessant, rogemus.*"—De Leg. i. c. 13; *et vide* c. 15.

"Indicavit mihi Pansa meus Epicureum te esse factum. . . . Sed quonam modo jus civile defendes, *quum omnia tuâ causâ facias non civium.*"—Ep. ad Fam. 12. (Trebatio.)

(b) Hugonis Grotii, De Imperio summarum potestatum circa sacra Commentarius posthumus: Paris, 1547. Montesquieu, De l'Esprit des Lois, l. xxiv. cc. 14–18.

Discours, Rapports, et Travaux inédits sur le Concordat de 1801, les Articles Organiques, &c. &c., par Jean Etienne Portalis; publiés et précédés d'une Introduction, par le Vicomte Frédéric Portalis: Paris, 1845, (Art. Organ. 6,) p. 66.

"I, however, am far from inculcating persecution, although I venture to say, that there might be a state of religion in a country which it might be the duty of the State to prohibit. Religion is not a mere matter of commerce between man and his Creator, but a lively motive of public action; and however it may become matter of conscience, it must become also, like other things, a motive of human conduct, and, of necessity, a subject of human laws. A State has a right to prohibit that of which the prohibition is essential to its security."—Lord Wellesley's Speech in the House of Lords, on the Motion for a Committee to inquire into the State of the laws affecting Roman Catholic Subjects, April, 1812.

(c) Portalis, ubi sup. p. 579.

(d) Grotius, l. ii. c. xx. 44, 3. He proceeds to cite some striking passages from Philo, Plutarch, Chrysippus, and Aristotle, and the Roman Law, which supports this view.

(e) "Rex Anius, rex idem hominum Phœbique sacerdos."—Virg. Æn. iii. 80.

(f) Speaking of Numa, Livy says, "Ad hæc consultanda procurandaque, multitudinem omni a vi et armis conversâ, et animi aliquid agendo occupati erant, et

[*283] fluencing as it did both the private conduct of the *citizen and the public administration of the State, as demonstrative of the superiority of their government over that of all other nations; and he contrasts the general faith which prevailed in the acts of the God-fearing Roman(*g*) with the discredit universally attached to that of the degenerate and irreligious Greek.(*h*)

Long after the Republic had decayed under the fate which this wise man had foretold to it, the *jus sacrum* was still considered as a part of the public law,(*i*) and found its place in the laws of the heathen emperors. The celebrated definition of jurisprudence, "*rerum divinarum atque humanarum scientia*," viewed in this light, was not so incorrect as is sometimes supposed: it did not necessarily mean a knowledge of theology, but rather a knowledge of the laws appertaining to the *status* of religion as one of the established institutions of the State.(*k*)

CCLXXXIII. (*l*) It is true that the great doctrine of the Unity and Brotherhood of the human race revealed by our *Saviour was [*284] wholly opposed to the opinions and belief and to the philosophy of the ancients: and against it the Emperor Julian loudly and eagerly protested. But in the provisions of the Roman Law, as in those of the laws of other countries with respect to religion, thus incorporated with the constitution of the State, we read the great truth that the State is not a mere mechanical institution concerned solely with the external life of its citizens, but that it is built(*m*) of necessity upon foundations of a moral and spiritual character, and that this character is the principal element of its strength, and the real spring of its continued existence.

CCLXXXIV. The introduction of Christianity tended still further to strengthen those foundations, adding the sanctions of the Creator's revealed will(*n*) to the voice of conscience and the instinctive sense of

Deorum assidua insidens cura, quum interesse rebus humanis cœleste numen videretur, eâ pietate omnium pectora imbuerat, ut fides ac jusjurandum proximo legum ac pœnarum metu, civitatem regerent."—L. i. c. 21. Polyb. 6, vi.

(*g*) Cicero's observations on the College of Augurs are remarkable:—six children of the principal Etruscans were, he says, by order of the Senate, brought at one time to Rome,—“Ne ars tanta, propter tenuitatem hominum, a religionis auctoritate abduceretur ad mercedem.” De Div. i. 41.

“Sed dubium non est, quin hæc disciplina et ars augurum evanuerit jam et vetustate et negligentia. Itaque neque illi assentior, qui hanc scientiam negat unquam in nostro collegio fuisse; neque illi, qui esse etiam nunc putat, quæ mihi videtur apud majores fuisse dupliciter, ut ad reipublicæ tempus nonnumquam, ad agendi consilium sæpissimè pertineret.”—Cic. De Leg. i. ii. c. 13; et vide c. 9, et De Div. i. i. c. 15. Dion. Halyc. l. ii. c. 16. Polyb. 6, vi.

(*h*) Yet see Cic. De Leg. i. ii. c. 14.

(*i*) Dig. i. t. ii. 2, De Just. et Jure. “Publicum jus est quod ad statum reipublicæ Romanæ spectat. Publicum jus in *sacris*, in *sacerdotibus*, in magistratibus consistit.”

(*k*) Bynkershoek, de Relig. Peregrina, &c., c. 1.

(*l*) Laurent, Hist. du Droit des Gens, t. iii. p. 367.

(*m*) “Denique in his delinquendi est gravius periculum, ubi Fides violatur, aut jusjurandi Religio contemnitur, nam grave est fidem fallere quæ justitiæ totius firmamentum est, quâ non solum reipublicæ, sed omnis humana societas continetur, et quod perjurium atheismo sit detestabilius, cum perjuri numen agnoscere videantur, sed ipsum irridere audeant.”—Zouch, part i. s. v. 5.

(*n*) “They who hold Revelation give a double assurance to their country.”—Burke's Works, vol. x. p. 39. Speech on a Bill for the Relief of Protestant Dissenters.

right and wrong by which the duties of the citizen were supported and enforced.

At the same time the origin and nature of Christianity rendered its incorporation into the State, in the manner in which Pagan worship had been incorporated, impossible.

The Church began by direct and uncompromising hostility to the existing religion of the State,^(o) with which it refused to be in any way identified, and of which it was necessarily altogether intolerant. The maxim of later times, "*Cujus est regio, illius est religio*," is blasphemous in theory and false in fact.^(p)

*When Christianity had triumphed, and become, not only one of the *collegia licita* but, the actual religion of the nation, it was [*285] still, by the very charter of its being, a body distinct from the State; touching it, however, and being touched by it, in so many ways, that the teachers of its doctrines soon became endowed with goods and lands, either by individuals under the sanction of the civil power, or by the State itself. The Church became, to borrow a term familiar in modern times, *established* in every Christian kingdom.

It thus became a *collegium licitum*,^(q) under the protection of the State as to its *establishment*; but having a divine mission, a divinely constituted order, a divinely given doctrine, it remained, as it must ever remain, in all these respects, independent of human authority.

CCLXXXV. In return for endowment and protection^(r) the Church gave the State a security beyond the reach of human laws, for the obedience and good conduct of its subjects. She taught that subjects should "render unto Cæsar the things that are Cæsar's, and unto God the things that are God's;" that temporal magistracies were "ordained of [*286] *God;" that subjects must obey, "not only for wrath but also for conscience sake;" "that the fear of the Lord is the beginning of wisdom," and "that unless the Lord keep the city the watchman waketh but in vain."^(s) The immediate result of Christianity was to strengthen the hands of government, to render patriotism a religious as well as a

(o) Such, for instance, as must, at this day, be the relation in which the Greek Church stands to the established religion of Turkey. Packman, *Lehrbuch des Kirchenrechts*, 162, 157.

(p) Packman, i. 135, p. 162.

(q) "Neque societatem, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur . . . item collegia Romæ certa sunt, quorum corpus Senatusconsultis atque Constitutionibus Principalibus confirmatum est . . . quibus autem permissum est corpus habere collegii, societatis, sive cujusque alterius eorum nomine, proprium est, ad exemplum Reipublicæ habere res communes, arcem communem, et actorem sive Syndicum, per quem, tanquam in Republicâ, quod communiter agi fierique oporteat, agatur et fiat."—Dig. l. iii. t. 4, l. 1. Dig. xlvii. 22. Cod. l. i. t. 2, 19, 23, 26, (De Sacrosanctis Ecclesiis,) et t. 3, (De Episcopis et Clericis.)

(r) Warnkönig says: "In primâ (i. e. Juris Publici parte) est ponendum jus *ecclesiasticum*, apud veteres jus *sacrum*. Hoc jure definitur ecclesiæ potestas et constitutio, magistratuum ecclesiasticorum imperium et jurisdictio, omnisque hierarchiæ status. Introducta sunt hoc jure sacra, instituta sancta, ecclesiastica judicia et leges ad res privatas publicasque religione moderandas. Sæpe conjuncta esse solet cum hac juris publici parte institutio publicæ et disciplinarum artiumque liberalium summa cura."—*Instit. Juris Romani Privati*, c. i. t. v. (Introd.)

(s) Psalm cxi. 10. Eccles. i. 16.

civil duty. "Tolle religionem," says Leibnitz,^(t) "et non invenies subditum qui pro patriâ, pro republicâ, pro recto et justo, discrimen fortunarum, dignitatum, vitæque ipsius subeat, si, eversis aliorum rebus, ipse consulere sibi, et in honore atque opulentâ vitam ducere possit."^(u)

Montesquieu speaks in a similar strain: "Bayle," says he, "ose avancer que de véritables Chrétiens ne formaient pas un état qui put subsister. Pourquoi non? Ce seraient des citoyens infiniment éclairés sur leurs devoirs, et qui auraient un très grand zèle pour les remplir; plus ils croyaient devoir à la religion, plus ils penseraient devoir à la patrie. Les principes du Christianisme, bien gravés dans le cœur, seraient infiniment plus forts que ce faux honneur des monarchies, ces vertus humaines des républiques, et cette crainte servile des états despotiques."^(x)

CCLXXXVI. Rome was the mistress of the world when the Christian Church was planted, and was still the mistress of the world when the Christian Church was established. The connexion therefore, at first, between Church and State was identical with the connexion between the Church and the Roman Empire.^(y)

To make this coincidence the more striking, Constantine divided the Roman Empire into four prefectures:

[*287]

*1. The prefecture of Italy.

2. Of Illyria, excluding the Western Illyria.

3. Of the Gallias.

4. Of the East.

Each prefecture was divided into Dioceses or Vicariates, and these again into Provinces. The principal city in each province was called, though not till late, in the language of *civil* life, the Metropolis.

It is remarkable that the Ecclesiastical division bore a close relation to this order of the State. The four Patriarchates resembled in many respects the four Prefectures.

The Patriarch of Rome comprised all the West, Italy, the Gallias, Illyria; the Patriarchs of Antioch, Alexandria, Jerusalem and Constantinople, occupied the territories comprised in the Prefecture of the East.

^(t) Leibnitz, Epist. Censor. contra Puffendorf, s. vi.

^(u) Robespierre's remark is well known:—"Si Dieu n'existait pas, il faudrait l'inventer."

^(x) Esprit des Lois, l. 24, c. 6. These passages are cited in Walter's Kirchenrecht, s. 38.

^(y) Nobody now denies that the donation of Constantine to Pope Sylvester is wholly fabulous. But it excited the indignant regret of Dante:—

"Ahi, Costantin, di quanto mal fu madre

Non la tua conversion, ma quella dote

Che da te prese il primo ricco padre."

Inf. 115.

Before Ariosto wrote, the fraud had *lost its odour and stank*. He found the donation in the repository of things lost on earth, the moon:—

"Di versate minestre una gran massa

Vede, e domanda al suo dottor, ch' importe.

L' elemosina è (dice) che si lassa

Alcun, che fatta sia dopo la morte.

Di vari fiori ad un gran monte passa

Ch' ebbe già buono odore, or putia forte,

Questo era il dono (se però dir lece)

Che Costantio al buon Silvestro fece."

Orland. Fur. c. 34, 80.

Exarchs and Primates exercised a jurisdiction not unlike that of civil Vicars over Metropolitans.

In every province the principal city became the seat of an Episcopal See. It sometimes happened that one Metropolitan presided over the Bishoprics of several provinces.(z)

*CCLXXXVII. (a) The tendency and the object of Christianity was not merely to affect the spiritual condition of individuals, but to form them into a peculiar human society. [*288]

The end of this Society was to obtain immortal happiness after death—the means were to believe in its Divine Founder, and to will and to act in conformity with his commands. It was in its nature irrespective of the material order of things in which it was placed. It was a spiritual Society so far as a Society of human creatures could be; but being necessarily a Society, not of spirits, but of men, it stood in need of material signs and means to accomplish its end. It was a visible and material order of men united for a common object. As far as each individual was concerned, Christianity was confined to internal operation between him and his God; but as far as the Society was concerned, like every other material union, that is, every union of corporeal persons, external means for its operation. It required human government, therefore, inasmuch as it was a human Society, in order that, by the use of external and material means, the spiritual end which it proposed to itself might be the easier obtained. This Society, so outwardly shaped and constituted, is what we usually denominate the Church.(b)

*This Society was independent of the territorial limits of kingdoms, but the individuals composing it must exist within [*289] those limits, they must be subjects or members of a State, a temporal Society, as well as of the Church, a Spiritual Society.(c) If the State,

(z) Lequeux, *Manuale Compendium Juris Canonici*, t. iv. p. 46. *Tableau de l'Eglise dans l'Empire Romain*, p. 206.

The English Canonists and Ecclesiastical Historians limit the Roman Patriarchate to a part of Italy, Sicily, Sardinia, and Corsica.—Bramhall's *Just Vindication*, vol. i. p. 156, ed. Oxon. Bingham's *Antiqu.* ii. 17, 20.

(a) *Saggio Teoretico di Dritto Naturale*, appoggiato sul fatto, del P. Luigi Taparelli (Leovino, 1845), Parte quinta, Dissertazione quinta, c. 1-2.

The reader will find the Ultramontane theory stated with great acuteness of logic and admirable precision of language in this work.

(b) "The Church being a supernatural society, doth differ from natural societies in this, that the persons with whom we associate ourselves in the one, are men, simply considered as men; but they to whom we be joined in the other, are God, angels, and holy men. Again, the Church being both a society and a society supernatural, although, as it is a society, it have the self-same original grounds which other public societies have, namely, the natural inclination which all men have unto sociable life, and consents to some certain bond of association, which bond is the Law that appointeth what kind of order they shall be associated in, yet unto the Church, as it is a society supernatural, this is peculiar; that part of the bond of their association which belongs to the Church of God must be a Law supernatural, which God himself hath revealed concerning that kind of worship which His people shall do unto Him. The substance of the service of God, therefore, so far forth as it hath in it anything more than the Law of Reason doth teach, may not be invented of men, as it is amongst the Heathens; but must be received from God Himself, as always it hath been in the Church, saving only when the Church hath been forgetful of her duty."—Hooker, *Ecclesiastical Polity*, b. i. s. 15.

(c) The subject of a Foreign Spiritual Corporation is glanced at in the case of

in its corporate capacity, recognized the religion of Christ, and established a Church, then the individual Christians were bound by the double tie of private will and social duty to the authority of the Church. But if it happened that the State did not socially recognize Christianity, then the individual Christians must remain members of both Societies. The present state of Turkey might be cited as an illustration of the truth of this proposition.

In fact, the duties and the rights of the citizens remain, and those of the Christian are superadded. The statement of Grotius on the subject is perspicuous and sound:—

“Atque ita absurdum non est dari duo *Judicia summa*, sed generum diversorum, quale est in sacris *Judicium directivum* Ecclesiæ Catholicæ, et *Imperativum* summarum potestatum. Nam nec illo *Judicio* inter humana ullum est majus *auctoritate*: neque hoc ullum majus *potestate*.”(d)

As the Church has a peculiar relation to the State, so the Christian nation has the *speciale jus gentis fidelis*(e) in its intercourse with Christian nations, as well as the *jus commune* with Heathen nations, who are members of the great community of States. And so far the introduction [*290] of Christianity *would not appear to have given rise to any difficulty in International Jurisprudence.

The difficulty, it will be seen, proceeds from the disputes which have arisen among Christians and Christian nations with respect to the external government of this spiritual, but human, Society.

These disputes relate both to *the person in whom this authority is lodged*, and also to *the extent of that authority* among those who are agreed as to the person in whom it is vested.

The reasoning of the Roman Church is this,—the external and visible Church must be governed by an external, visible, and infallible authority; that authority must be lodged in one person, and that one person must be the Pope,(f) without whose sanction no bishop can be lawfully appointed, and who, for the purpose of duly exercising the authority, must possess a power irrespective of and superior to that of all temporal Sovereigns. On the other hand, the Gallican(g) and the English(h)

The Society for the Propagation of the Gospel, &c. v. Wheeler et al., 2 Gallison's (American) Reports, 104.

(d) Grotius, De Imp. summ. potest. circa sacra, c. v. p. 91.

(e) Vide ante, vol. i. p. 24.

(f) Taparelli, par. v. dis. v. c. 2, s. 1411.

(g) Dupin states concisely the Gallican opinion, thus: “Verum ut majorem hinc lucem afferamus, distinguenda sunt plura in Romano Pontifice:—Primo, quod sit primus Episcoporum. Secundo, quod sit Metropolitanus et Patriarcha. Tertio, quod aliquas habet prerogativas, aliqua jura peculiariter concessa. Quarto, quod habet potestatem temporalem in patrimonium Sancti Petri.”—De Ant. Eccles. Disciplinâ, Diss. Historiæ, iv. p. 368, (ed. 1788.)

(h) The Anglican doctrine on this point is well stated in the Vindiciæ, Ecclesiæ Anglicanæ, by Mason, (ed. 1625,) p. 430. The dialogue in the work is carried on by Philodoxus, a Romanist, and Orthodoxus, an Anglican;—

“*Phil.*—Christus Dominus supremum Ecclesiæ caput, potuit per seipsum omnes illas Ecclesiasticas actiones exercere, quarum potestatem aliis tradidit.

“*Orth.*—Rectissimè. Quam enim Apostolis prædicandi, baptizandi, ordinandi Eucharistiam ministrandi concepit potestatem, quanta quanta erat, ab ipso solo originem duxit. . . .

Churches, and many *Cis-montane* canonists, hold that the Episcopate is not necessarily dependent upon the *Pope; they assert that during the first centuries of the Church, and at a still later [*291] period, the Patriarch of Rome exercised no jurisdiction, properly so called, over the other Patriarchs, though a great respect, approaching to homage, might have been originally paid by the Ecclesiastical authorities of all countries to the Bishop of the Imperial City—a respect which the Gallican Church is still willing to continue.(i) The Protestant Churches, which have rejected Episcopacy *à fortiori*, deny the claims of the Papacy.

The importance of these two views, in their bearing upon International Law, is, as will be seen, very great. It must be the duty of the International Jurist to ascertain whether these Papal claims are consistent with the Rights of Nations;(j) whether they are supported by credible evidence, by the records and practice of States; whether the claims have varied from time to time according to the energy of pontiffs and the weakness of princes, or whether they have been always inflexibly the same, flowing from the *reason of the thing*;(k) and whether the most extravagant claims have not been the legitimate consequences of [*292] the premises laid down by the Curia *Romana. It will be seen that the double condition of the Pope, as spiritual chief and temporal prince, has greatly complicated a question, sufficiently difficult under a single aspect.

CCLXXXVIII. When the seat of empire was transferred to Constantinople, even this homage of comity, so to speak, was materially diminished. Theodosius II. indeed inserted an ordinance in his Code, that all nations subject to him should receive the faith which Saint Peter had delivered to the Romans; and Valentinian III. forbade the bishops of the provinces to depart from ancient usages without the sanction of the Venerable man, the Pope of the Holy City.(l)

"Phil.—*Idem etiam dicendum est de Papa.*

"Orth.—*Esto, et de quovis Episcopo.*"

(i) Taparelli's mode of disposing of the difficulty of the Gallican Church is edifying: "Non pretendiamo qui tacciare *teologicamente* la opinione gallicana, ma godiamo non considerare che la divisione da noi stabilita delle *forme di governo*, a rigor di filosofia, venga qui a giustificare la riprovazione, che soffrirono più volte dalla Chiesa, le famose proposizioni del 1682. I loro difensori *non comprendeano* che *logicamente* la Chiesa presso di loro diveniva repubblica, epperò non furono anatema, e ei sono fratelli, *ben cari* fratelli: ma la loro conseguenza colà audrebbe a parare, ed ecco perchè nella vigna del vero non potea mettere radice,—*eradicabitur.*"—Taparelli, ib. 1435, note.

(j) Grotius (De Imp. circa sacra) cites with approbation, the following passage from Suarez:—"Semper autem servatum videtur ab hominibus ut licet particulares magistratus Civiles et Sacerdotales diversis hominibus tribuerentur, quia varietas actionum istam distinctionem postulabat, nihilominus suprema potestas utriusque ordinis, præsertim quoad leges ferendas, in uno Principe collocaretur. Et ita Regibus et Imperatoribus semper tributa fuit hæc potestas in Romana urbe et imperio, ut ex historiis constat. Idemque de aliis communitatibus verisimile est."—Tract. de Leg. &c. l. ii. quæ 29, art. iii.

(k) Vide ante, vol. i. c. iv.

(l) Codex Theodos. xvi. 1-2. Die Römischen Päpste, ihre Kirche und ihr Staat, B. i. c. i. Planck, Geschichte der christlich-kirchlichen Gesellschaftsverfassung, i. 642.

Theodosius II. published his Code A. D. 435. Valentinian III. reigned from A. D. 424 to 455.—L'Art de Vérifier les Dates.

Nevertheless, the effect of the division of the Empire was to leave the Bishops of Rome practically without the protection of the Emperor, though theoretically, he retained his pretensions both to the territory of Italy and to the allegiance of the Roman See. The generals of Justinian in the middle of the sixth century delivered Italy from the dominion of the Ostrogoths; but within twenty years from the period of the victory of Narses in Campania,^(m) a new foe, the Lombards, from the North of Germany, conquered the upper part of Italy, and planted himself at Pavia.⁽ⁿ⁾

It was not long after this period that Pope Gregory the Great, who had in vain besought the Emperor Maurice *not to confirm* his election, became, by the force of circumstances and against his will, a temporal prince, and the Protector of Civil and Spiritual Rome against the foreigner and Arian. Then were laid the foundations of the mediæval papacy. But we must hasten onwards.

[*293] *CCLXXXIX. Of all the German races which had raised their rude and vigorous nationality upon the crumbling and corrupt civilization of the Roman Empire, the Franks were for a long period the foremost and the most powerful in Europe; they, too, were among the first barbarians who embraced Christianity, and their subsequent connexion with the Patriarch of Rome laid the first foundations of that system, the consideration of which must occupy an important place in a work upon International Law.

CCXC. The monarchy founded by Clovis^(o) included nearly the whole of Gaul and the greater part of which is now called Germany. In the hands of his successors, the newly-founded kingdom was divided and brought to the verge of dissolution, but the Mayors of the Palace grafted the energy and talent of the Carlovingian upon the decaying stock of the Merovingian Dynasty.^(p)

Pépin d'Heristal reunited the kingdom which he governed, though without the title of King; as did his illustrious son, Charles-le-Martel,^(q) who earned the gratitude of Christendom by delivering^(r) her from the aggressions, till then resistless, of the infidel Saracen. Pépin-le-Bref, the son of Charles, added to the real power of the monarchy the title of King; which, for sixty-five years, the Carlovingians had allowed to decorate the puppets in whose name they ruled. Pépin-le-Bref^(s) took a step fraught with the most important consequences, both to the future relations of the Church and State in France, and to the international relations of every State with the See of Rome: he invoked the aid of religious sanction to secure his throne, and, first of the Frank Kings, caused himself to be crowned in the Cathedral *of Soissons, by St. Boniface, [*294] the first Archbishop of Mayence.

St. Boniface, himself an Anglo-Saxon, was devoted to the Roman See.

(m) Belisarius was recalled, 549; Narses destroyed Tejas, the last Gothic king of Italy, A. D. 553. Justinian died, A. D. 565.

(n) A. D. 592.

(o) A. D. 485.

(p) A. D. 687, the date of the victory by which Pepin reunited Austria (Oesterreich) and Neustria (Westerreich.)

(q) A. D. 714.

(r) A. D. 732, 737, at Poitiers and Narbonne.

(s) A. D. 752.

He persuaded the bishops, not only in Germany, but in Gaul, where they appear to have been previously independent, to acknowledge submission to the successors of St. Peter at Rome.

At the time of Pepin's coronation, the Roman See was in the deepest distress. The King of the Lombards(*t*) had seized upon the Exarchate of Ravenna, where the last remnant of the authority of the Greek Emperor remained, and threatened Rome with destruction.

Stephen II., the then Bishop of Rome, appears to have first endeavoured to renew his relations, long practically severed, with the Greek Emperor;(*u*) but, as the danger became more and more pressing, he resolved to implore the assistance of the Franks, then renowned throughout Europe for their victories over the enemies of the Christian faith, and whose King, as St. Boniface had written, alone enabled him to execute his apostolical mission in Germany with safety or effect.(*x*)

CCXCI. The consequences of this resolution have ever since affected the destinies of the world. The compact between the spiritual and secular powers of Western Europe(*y*) was soon adjusted; the necessities of both arranged without difficulty the terms. Stephen II. consecrated Pépin anew in the Church of St. Denis, and at the same time also his two sons Charles and Carloman; he absolved the consecrated usurper from the oath of allegiance which he had sworn to Childric, the remaining phantom of the Merovingian Dynasty; and adjured the Frank lords in the name of Christ and St. Peter, to be faithful to their new Sovereign; and, *lastly, he conferred on Pépin and his two sons the dignity [*295] of Patricians of Rome.

Pepin was not wanting in substantial marks of gratitude for the aid which the spiritual power had rendered to his new-made throne. He drove the Lombards out of the Exarchate,(*z*) and conferred the fertile provinces comprised under that name, not upon the Greek Emperor, to whom by strict right they appertained, but upon the Bishop of Rome; declaring, with an oath, that he had embarked in the contest, not for the favour of many, but “*pro amore Petri et veniâ delictorum.*”(a)

CCXCII. Grotius, in that part of his great work, *De Jure Belli et Pacis*, in which he argues that Kings who do not hold their sovereignties *pleno jure* cannot alienate any part of them, deals, among other supposed instances to the contrary, with the story that Louis, the successor of Charlemagne, restored the City of Rome to Pope Paschal (A. D. 817;) and his language is remarkable respecting the character and status of the Pope and of the Roman people at this period: “*Nec quod idem ille Ludovicus urbem Romam Paschali Pontifici reddidisse legitur ad rem facit, cum Franci imperium in urbem Romam a populo Romano acceptum reddere populo eidem rectè potuerint, cujus populi personam sustinebat is qui primi ordinis princeps erat.*”(b)

(*t*) Astolphus.

(*u*) A. D. 751.

(*x*) Ranke, b. i. c. i.

(*y*) Koch, *Tableau des Rev.* i. 32.

(*z*) The Archbishop of Ravenna, while the war of the Lombards with Pepin and Charlemagne lasted, seized every opportunity of defying the authority, spiritual and temporal, of the Roman See. Muratori, *Annali*, t. iv. pp. 347, 371. Savigny, *Geschichte des Römischen Rechts im Mittelalter*, i. 359.

(a) Ranke, b. i. c. i.

(b) L. ii. c. 3, xiii.

CCXCIII. What Pepin began, Charlemagne completed.^(c) That mighty monarch, while engaged in the work of exterminating the Lombard dominion, repaired to Rome, and ratified the endowments of Pepin.^(d) [*296] Charlemagne was received at Rome with the honours due to an *Exarch* and *Patrician*,^(e) and under these titles he began to put in force that jurisdiction over the Ecclesiastical State which the Greek Emperors and Exarchs had exercised before him.

It was not, however, till after a quarter of a century had passed away that Charlemagne was fully installed in the dignity of his Imperial predecessors. The Pope again invited his all-powerful ally to Rome; but this time it was against a domestic and not a foreign foe. Leo III., like Pius IX. in our time, could no longer resist the contending factions which, in Rome itself, set at nought his authority. The victor of Western Europe reinstated the Pope in his authority, who, in return, placed upon his head,^(f) while he knelt at the altar of St. Peter's, upon Christmas Day, A. D. 800, the crown of the Western Empire, and proclaimed him Emperor of the Romans.

This was one of the rare conjunctures—the reigns of Constantine and Justinian alone furnish similar instances—in which the Church and State were thoroughly incorporated. Certain it is, that these Emperors exercised, whether with or without the consent of the Church,^(g) functions and jurisdictions which partook largely of a spiritual character. Nor can it be denied that a new kind of power over religion was now conferred upon the Governor of the State. As a civil magistrate, heathen or Christian, he had always had control over all that concerned the welfare of society, and therefore, incidentally, some power over the subject of religion; but now he was constituted its protector.^(h)

CCXCIV. But the Papacy, thus placed under the protection of the French Emperor, remained, more or less, in the same relation to his successors, the Emperors of Germany, *until the 1st of August, [*297] 1806;⁽ⁱ⁾ they then became the Emperors of Austria, and this relation, long practically disused, nominally, as well as really, ceased.

The hands of Charlemagne's successor were too feeble to hold the sceptre of his vast dominions, from the divisions of which sprung the distinct nationalities of States and, in some measure, of Churches, which afterwards composed the commonwealth of Europe.

It should be observed, that by the Constitution of Charlemagne, the

(c) A. D. 768.

(d) A. D. 774.

(e) Koch, *Tabl. des. Rev.* i. 42.

(f) The Pope seems to have considered the *coronation* as a necessary confirmation of the act of the civil or constitutional law.

(g) Phillipps, *Kirchenrecht*, iii. 60, 61.

(h) See some remarks of Portalis (as cited in Lequeux, iv. 535,) upon the fifth article of the Organic Articles of Napoleon. Phillipps, *K. R.* iii. 382.

(i) In a little pamphlet published at Vienna, 1849, entitled *Deutsch oder Russisch*, will be found some striking remarks on the consequence of this change:—"Die Deutsche Kaiserstellung war die Grundlage, auf welcher die österreichische monarchie emporgewachsen. Ungeachtet des unglücklichen politischen und kirchlichen Systems, durch welches sich Oesterreich mehr und mehr von Deutschland absonderte, war die *historische Kaiseridee*, doch nach innen und aussen mächtiger, als die habsburgischen Fürsten einsahen," u. s. w. Pp. 6, 7.

German and French clergy were under the control of the Bishop, the Bishop of the Metropolitan, the Metropolitan *not* of the Pope, but of the Emperor.

*CHAPTER III.

[*298]

THE GROWTH OF THE AUTHORITY AND PRETENSIONS OF THE POPE.

CCXCV. FOR a while after the death of Charlemagne, the Papal power seems to have been greater than the Imperial; but soon after the German Emperors were seated on the throne, the political subjection of the Popes is, as a matter of history, unquestionable. They were content for a time to countenance with their authority a new political system which sprung up about this period in Europe, according to which all Christians belonged to a great Republic, of which the Spiritual chief was the Pope, and the Temporal chief the Emperor.(a)

For a time this doctrine was a formidable instrument in the hands of the Emperor. The great Protector of the Church, in the exercise of his office, watched over the interests of the Roman See, convened general councils, and claimed the tremendous prerogative of nominating, or at least confirming, the Pope. Such a prerogative was exercised from the time of Otho the Great to that of Henry IV. Henry III. deposed three schismatical Popes, and nominated more than one German Pope.

CCXCVI. Otho and his successors created the great ecclesiastical princes of Germany,(b) thereby weakening the empire, but unintentionally constituting, perhaps, a defence for the German National Church against Rome, such as at *the Council of Ems, in the reign of Joseph II., all but established the complete and entire indepen- [*299] dence of that Church from the See of Rome.

Before the beginning of the fourteenth century, the majesty of the German Imperial crown had faded away; the federal system had destroyed it, and the Emperor was only the Suzerain of the many independent States which composed it.(c) Upon the ruins of the Imperial authority arose the edifice of Papal power in its fullest dimensions; of this edifice the skill, energy, and ability of Gregory VII.(d) (Hildebrand,) about the year 1073, had already laid the deep and careful foundations, and from A. D. 1074 to 1300, it lifted up its head over all the dominations of earth.

CCXCVII. And here it must be observed that these events had imported new and strange elements into International Law:—

First. A great spiritual had become a considerable secular power, and

(a) Koch, i. 78–81.

(b) German canonists contend that the Roman cardinalate was formed on the model of these ecclesiastical principedoms.

(c) Koch, i. 1.

(d) His election was confirmed, at his own request, by the Emperor. His Papacy extended from 1073 to 1085 he had been subdiaconus under six Popes.

the difficult question had arisen how were other secular States to carry on their relations with it?

Secondly. This spiritual power was no longer identified with the limits and extent of one dominion; it claimed equal authority over many distinct kingdoms, which stood as it were apart from, and yet were most intimately connected with, this Foreign Power. It wielded an authority over the citizens of every kingdom, and exacted an allegiance upon oath from them far above that which the Municipal Law of their own country could impose, or the temporal Sovereign enforce.

Thirdly. In process of time it collected a feudal revenue of no inconsiderable amount from the governors and subjects of foreign realms.

Fourthly. This spiritual ruler claimed and exercised a power of absolving Sovereigns and subjects from their oaths.

[*300] *Fifthly. This spiritual power claimed for the officers which it employed in each kingdom, a status wholly distinct from that of the subjects of each kingdom, whether these officers were or were not born subjects of the kingdom.^(e) This separate status was claimed for the persons and the property of the clergy (clerus,) and the law by which they were to be governed. Justinian had intended to Christianize as well as compile the fabric of Roman Jurisprudence. He meant to be the religious as well as the civil legislator of the world. The Christian faith, the Christian doctrine, the status of the Christian clergy in all its branches, are the subjects of his laws.^(f)

It was not, however, in their clerical character, but as subjects in their civil capacity, that the clerus claimed to live under the Civil Law of Rome; and it appears even from one of the constitutions of Clothaire, as early as A. D. 560, and from various records of the ninth and eleventh centuries, that in the Frank kingdom the clergy were permitted to live under the Roman Law. It seems, however (and the fact is very remarkable,) that even then the clergy in Lombardy had the option of declaring whether they would live under the Roman or Lombard Law.^(g) So early was the struggle begun between the nationality of the individual and the law of the order to which he belonged.

But while the clergy lived under the Civil Law of Rome, they were pretty much in the same predicament as the conquered provincials, who were equally, in the early part of the Middle Ages, allowed to choose a personal law distinct from the law of their domicile.^(h) When various [*301] foreign spiritual enactments, and at last the elaborate compilations of the Canon Law, were promulgated, the difficulty of reconciling a foreign spiritual with a domestic secular allegiance became greater or, at least, the distinction became sharper and more prominent between the two.

(e) Savigny, *Geschichte des Römischen Rechts im Mittelalter*, i. 141-2.

(f) Milman, *Hist. of Latin Christianity*, i. 355, &c., contains an able review of these laws of Justinian.

(g) "Ego Teopertus archipresbiter Ecclesiæ Sancti Juliani qui professus sum legem vivere langubardorum."—Vide Savigny, *ubi supr.* It seems, however, that this power of option was confined to Lombardy.

(h) Savigny, *Gesc. R. R.* ii. 274. At first the spiritual edicts contained large and literal extracts from the Roman Civil Law.

That those, whose sacred office it is to be the teachers of religion, should be clothed with a privileged and cosmopolitan character, seems to be in accordance with the natural feelings of man in every part of the world, not wholly barbarous and uncivilized. We know, from the recent travels of a most intelligent Roman Catholic missionary in China and Thibet, that in these interesting countries this notion very generally prevails; (i) but the subject immediately under our consideration is that of an *imperium in imperio*, caused by the double allegiance of the native clergy.

*CCXCVIII. The collision between the two powers of Church and State, accordingly, arose soon after the time of Charlemagne, [*302] and has continued in a greater or less degree up to the present time.

The temporal Sovereign soon began to claim as incidents both to his royal status, and to the independence of his country, various rights, which had for their object the control of Papal encroachment; of this nature were what are sometimes designated collectively as *Jura majestatis circa sacra*, the principal of which were:—

1. *Jus advocatiæ*—the right of protecting the Church establishments in his dominions (*Schutzrecht*), that right which in private patrons was called the *jus patronatus*.

2. *Jus cavendi*—the right of preventing the introduction of laws for the government of the national clergy at variance with their civil obligations (*Recht der Vorsorge*).

3. *Jus inspiciendi*—the right of inquiring into the manner in which the temporalities of this great corporation in his kingdom were administered, and of rectifying abuses.

CCXCIX. Now, for the first time, it should seem that the Roman Pontiff claimed the title of Pope, (l) to the exclusion of all other bishops, who had hitherto been equally designated by it. The celibacy of the clergy, which had taken no root in Germany, England, or the northern

(i) "Nous nous hâtâmes de nous rendre chez le Régent, et de lui faire part de la déplorable entrevue que nous avons eue avec Ki-Chan. Le premier Kalon avait eu connaissance des projets de persécution que les Mandarins Chinois tramaient entre nous. Il tâcha de nous rassurer, et nous dit que, protégeant dans le pays des milliers d'étrangers, il serait assez fort pour nous y faire jouir d'une protection que le gouvernement Thibétain accordait à tout le monde. Au reste, ajouta-t-il, lors même que nos lois interdiraient aux étrangers l'entrée de notre pays, ces lois ne pourraient nous atteindre. *Les religieux, les hommes de prière, étant de tous les pays, ne sont étrangers nulle part*; telle est la doctrine qui est enseignée dans nos saints livres. Il est écrit: *La chèvre jaune est sans patrie, et le Lama n'a pas de famille*. . . . Sha-Ssa étant le rendez-vous et le séjour special des hommes de prière, ce seul titre devrait toujours vous y faire trouver liberté et protection.

"Cette opinion des Bouddhistes, qui fait du religieux un homme cosmopolite, n'est pas simplement une pensée écrite dans les livres; mais nous avons remarqué qu'elle était passée dans les mœurs et les habitudes des lamaseries. Aussitôt qu'un homme s'est rasé la tête, et a revêtu le costume religieux, il renonce à son ancien nom pour en prendre un nouveau. Si l'on demande à un Lama de quel pays il est, il répond: Je n'ai pas de patrie, mais je passe mes jours dans telle lamaserie. Cette manière de penser et d'agir est même admise en Chine, parmi les bonzes et les autres espèces de religieux, qu'on a coutume de désigner par le nom générique de Tchou-kia-jin, homme sorti de la famille."—Voyage dans le Thibet, par M. Huc, Prêtre, Missionnaire de la Congrégation de Saint Lazare, vol. ii. p. 357.

(k) Traité de la Prérégative Royale, i. ch. viii. (Lorieux.)

(l) Koch, Tabl. des Révol. i. Période iv. p. 106.

kingdoms, and was continually disregarded in France and Spain, was practically enforced, and a powerful link which connected that order with the State was broken off, while a new link which connected it with a foreign power was forged. (*m*) The Popes *ceased to date their [*303] acts from the years of the reign of the Emperor, or to stamp their coin with his impress; the investiture of the ring and crozier, which bound the clergy very closely to the State, was successfully refused. The Sovereign was bound to nominate or confirm the nomination of any prelate. The Prefect of Rome was required to take the oath of homage and allegiance to the Pope, instead of to the Emperor; and it was with truth that Gregory VII. wrote to the German nation, respecting the Emperor: —“Non ultra putet sanctam Ecclesiam sibi subjectam, sed praelatam ut dominam.”(*n*) Quite consistently he claimed the empire as a fief of the Roman Church, and exacted from Hermann of Luxemburg, whom he set up as an anti-Emperor to Henry IV., a formal oath of vassalage. Tribute was exacted from and paid by the greater part of European States to the Pope. Royal dignities were conferred and taken away, oaths of loyalty imposed and annulled, at the bidding of the Roman See. (*o*) Hitherto the Emperors had exercised the right of confirming the election of the Popes and of deposing them; the same rights were now claimed by the Popes over the Emperors, and indeed over all other Sovereigns. It was, perhaps, a natural consequence of extending the spiritual power of excommunication to secular matters. The multiplication of religious orders claiming exemption from the jurisdiction of the State, and devoted to the Roman See, though one of those orders was destined to furnish its deadliest enemy, tended as well as the Crusades, to strengthen the hands of the Pope; for it was not merely against infidels that this weapon was [*304] used; Crusades were preached by Popes *against refractory Christian Kings and Republics, such as Venice in 1309; (*p*) against schismatical Princes, such as the Greeks and Russians; against pagans, like the Slavonic tribes on the Baltic; against heretics, like the Vaudois, the Albigenes, and Hussies. (*q*)

A confusion of ideas generated a confusion of authorities. Heresy, which, if it attacked the law of the State, might be a political crime, was punished with equal severity when it was a religious error. Infidelity to the Church was put on the same footing as rebellion against the throne. The Inquisition secured to the ecclesiastical authority the arm of the secular power, without any right of inquiry or intervention as

(*m*) See that monument of German industry and erudition, *Christliche Kirchengeschichte*, von J. M. Schröckh, xxvi. Theil 86, for the (Concordatum Wormatiense) Concordat of Worms, A. D. 1122, concluded between Henry V. and Pope Calixtus II. The Sovereigns were allowed, contrary to Gregory VII.'s intention, to preserve the bare feudal tie, by presenting with the sceptre the regale to the Bishop. The important words in the Concordat are, “Electus per sceptrum regale abs te accipiat.” Koch, ib. 121.

(*n*) Epist. l. iv. c. 3. Koch, ib.

(*o*) Collier, speaking of Becket's opposition to the Constitutions of Clarendon (A. D. 1164,) observes, “His tenet, that the Civil Government had its authority from the Church, was a grand mistake, and misled his practice.”—Church History, vol. ii. p. 328, ed. 1840.

(*p*) Portalis, *Introd.* vii.

(*q*) Koch, ib. 136, 137, notes.

a condition of its use.(*r*) Meanwhile the territory of the Roman See was, from various causes, largely increased, so also was her wealth, by contributions (*annates*) from all countries, and her power, from the causes already mentioned, to which should be added her claims to col-
late to benefices, which, under the pretext of rights of concurrence and prevention, she often enforced to the injury of the national prelate.(*s*)

It is true that many of these pretensions, especially the last, were founded upon the decretals of Isidore, now universally acknowledged to have been forged during the early part of the ninth century;(t) but it is difficult to deny that they flowed, as strict logical consequences, from the principles on which Rome, who, to borrow the French expression, "*ne recule pas*," founded, both at this and at a much later period, her authority.(u)

*CCC. About the year 1152, A. D., the *Decretum*, a systematic compilation of the existing canons and laws of the Church, was [**305*] compiled by Gratian and approved of by the Pope. About the year 1235, A. D., Pope Gregory IX. caused his chaplain to reduce into a regular order and system the constitutions of former Popes, including with them his own, and also the canons of the third and fourth Councils of Lateran;(x) these are the *Decretals*.(y) The *Sext* or *Sixth* book of *Decretals* was added by Boniface VIII.; Clement V. began another compilation, afterwards published, called *The Clementines*; another was made by John XXII., constituting the *Extravagantes Johannis*. To this were added, in 1483, other decrees of popes, the *Extravagantes Communes*. These celebrated compilations received the most deliberate stamp of the Roman Church's approbation, and were ordered to be publicly taught in all her schools, and to become the law of all her tribunals. The provisions contained in them have never been expressly repealed by the Papal authority which originally sanctioned them; though many canonists hold that some of them have fallen into desuetude.

(*r*) Portalis, *ubi sup.*

(*s*) Koch, 127, 111.

(*t*) "It is impossible to deny (Dean Milman says) that at least, by citing without reserve or hesitation, the Roman Pontiffs gave their deliberate sanction to this great historic fraud."—Hist. of Latin Christianity, vol. i. p. 379.

(*u*) Müller's defence is eloquent and ingenious:—"Wenn die Hierarchie ein Uebel wäre, besser doch als Despotie; sie sey eine leimerne Mauer, sie ist's doch gegen Tyrannei. Der Priester hat sein Gesetz, der Despot hat keins; jener beredet, letzterer zwingt; jener predigt Gott, letzterer sich. Man spricht weder die Unfehlbarkeit; wer darf eine Verordnung unweise oder ungerecht nennen, und ihr Gehorsam versagen?—wider den Papst, als ob ein so grosses Unglück wäre, wenn ein Aufseher der christlichen Moral dem Ehrgeiz und der Tyrannei befehlen konnte, bis hieher und nicht weiter!—wider die Personalimmunität, als ob ein grosses Unglück wäre, das jemand ohne Lebensgefahr für die Rechte der Menschheit reden durfte!—wider ihren Reichthum, als waren die Laien gebessert, wenn der Priester mit ihnen darbt?—wider Steuerfreiheit; die französische Clerisei giebt so viel als die Laien;—wider Usurpationen, ohne zu berechnen was die Fürsten der Kirche zu restituiren hätten für Kriege, Bedrückungen, Commenden, Pensionen, Reunionen;—wider die vielen Klöster, nicht wider die Vermehrung der Kasernen;—wider sechzigtausend ehelose Geistliche, und nicht wider hundert tausend ehelose Soldaten."—Müller, *Fürstenbund*. Werke, B. ix. S. 164, cited by Walter, *Kirchenrecht*, 41, n. p., and ib. 196.

(*x*) Held in the time of Alexander III., A. D. 1179.

(*y*) In the time of Innocent III., A. D. 1215.

[*306] *These compilations constitute that body of Papal Law which is known by the name of *Corpus Juris Canonici*.

It is intended to be the law of a Foreign Spiritual Chief for the government of a particular class of the subjects of independent States. To all nations, however, but the Roman States, it constitutes a body of Foreign Law. It is now universally acknowledged that it depends, as well as the *jus novissimum*, or later Canon Law, for its civil authority, upon the degree of Reception which has been accorded to it by the State.

Now in this body of Canon Law are contained, as will be seen in the following chapters, principles and doctrines utterly subversive of the independence of States, and inconsistent with the first principles of International Law.

[*307]

*CHAPTER IV.

THE *CORPUS JURIS CANONICI* AND THE PRINCIPLES CONTAINED THEREIN, AND IN SUBSEQUENT BULLS, AT VARIANCE WITH INTERNATIONAL LAW.

CCCI. THE Decretals which appear to be inconsistent with the independence of Foreign States, are known by the following titles, taken from the words with which they begin:—

1. *Venerabilem.*
2. *Solitæ.*
3. *Ad Apostolicæ.*
4. *Clericis Laicos.*
5. *Quod olim.*
6. *Unam Sanctam* and *Meruit.*
7. *Romani Principes.*
8. *Pastoralis.*
9. *Si Fratrum.*
10. *De Consuetudine.*

CCCII. The Emperor Henry VI. died in A. D. 1197. The majority of the electoral Princes chose Philip of Swabia for his successor; the minority, Otho of Brunswick, son of Henry the Lion. Philip had been excommunicated by the Pope for spoliating the Church's property. Both Princes were crowned. Innocent III. sent a legate into Germany, ordering the Princes to acknowledge Otho.

Duke Berthold of Zahringen, with the other Princes who supported Philip, sent a complaint to the Pope that his legate had done wrong, whether he acted in the capacity of elector or of judge.

[*308] *As an elector he had thrust his sickle into another man's harvest, and derogated from the rights of the Princes. As a judge he had decided in favour of one party in the absence of the other, who had not been cited.

Innocent replied to this in a letter which appears as the Thirty-fourth

chapter of the Sixth title of the First book of the Decretals of Gregory IX., and begins with the word *Venerabilem*, and was issued probably in A. D. 1202. This Decretal opens with a recital of the above-mentioned complaints, and goes on to recognize the power of election to be by law and usage vested in the Princes: "*præsertim cum ad eos jus et potestas hujusmodi ab Apostolicâ sede pervenerit, quæ Romanum Imperium in personam magnifici Caroli à Græcis transtulit in Germanos.*" The Princes, on the other hand, ought to acknowledge, and have acknowledged, "*quod jus et auctoritas examinandi personam electam in Regem, et promovendam ad Imperium, ad nos spectat, qui eum inungimus, consecramus et coronamus. Est enim regulariter et generaliter observatum, ut ad eum examinatio personæ pertineat, ad quem impositio manûs spectat.*" The legate had not discharged the office of an elector (*electoris*) or a judge (*cognitoris*), but of a denouncer (*denunciatoris*) of an improper choice. The voters for the improper person had thrown away their votes.^(a) The unfitness of the chosen was indisputable; "*sunt enim notoria impedimenta Ducis, scilicet excommunicatio publica, perjurium manifestum, et persecutio divulgata, quam progenitores ejus et ipse præsumperunt in Apostolicam sedem et alias Ecclesias exercere.*"

Moreover, the Duke had taken an oath against being Emperor. If it were an unlawful oath, it bound him as the Israelites were bound by their oath to the Gibeonites, though fraudulently procured.

*Besides, "*utrum verò dictum juramentum sit licitum vel illicitum, et idè servandum an non servandum extiterit, nemo* [^{*309}]*sanæ mentis ignorat ad nostrum judicium pertinere.*"

Lastly, it is suggested that if the Duke were to succeed his brother, who had succeeded his father, the electors would seem to lose their liberty of election, as the dignity would appear hereditary.

The remarkable points in this Decretal are the assertions:—

1. That the right of the electors was derived through the Roman See.
2. That the Pope had a right to examine, and therefore to reject, the elected whom he was called upon to consecrate and crown.
3. That an improper choice by the majority gave the Pope the power of sanctioning the choice of the minority.
4. That excommunication, and ancestral as well as personal offences against the Roman See, disqualified a person from being elected.
5. That to the Pope it belonged to judge whether a person should be absolved from an oath, whether it were lawful or unlawful, given bona fide or procured by fraud.

CCCIII. About the same time (A. D. 1200) the same Pope wrote to the Emperor at Constantinople touching the injury done to the Patriarch of Constantinople by placing him on a footstool to the left of the throne.

In this Decretal, the Sixth chapter of the Thirty-third Title^(b) of the first book of the Decretals, and which begins *Solitæ*, the Emperor is shown the folly of supposing that the passage in St. Peter's Epistle (I. 2-13,) could in any way indicate that the Priesthood was subject to

(a) A maxim, it may be observed, subsequently incorporated into English jurisprudence.—*Oldknow v. Wainwright*, 2 Burrow's Reports, 1017.

(b) De Majoritate et Obedientiâ.

the Temporal Power. Various reasons are alleged—the last is very remarkable:—

“Præterea nôsse debueras” (the Pope says to the Emperor,) “quòd
 [*310] *fecit Deus duo magna luminaria in firmamento cœli: *luminare
 majus, ut præesset diei: et luminare minus, ut præesset nocti:
 utrumque magnum, sed alterum majus. Ad firmamentum igitur cœli,
 hoc est, universalis Ecclesiæ, fecit Deus duo magna luminaria, id est,
 duas instituit dignitates, quæ sunt Pontificalis auctoritas, et Regalis
 potestas. Sed illa, quæ præest diebus, id est spiritualibus, major est:
 quæ verò carnalibus, minor: ut, quanta est inter solem et lunam, tanta
 inter Pontifices et Reges differentia cognoscatur. Hæc autem si prudenter
 attenderet Imperatoria celsitudo, non faceret, aut permetteret Constanti-
 nopolitanum Patriarcham, magnum quidem et honorabile membrum
 Ecclesiæ, juxta scabellum pedum suorum in sinistra parte sedere: cùm
 alii Reges et Principes, Archiepiscopis et Episcopis suis (sicut debent)
 reverentur assurgant.”*

It is difficult to extract any other position from this Decretal than that the kingdoms of the earth were in all respects subjected to the Church, and, therefore to the Pope.(c)

CCCIV. The advantage which accrued to the most extravagant of Papal claims from the baseness and wickedness of King John of England, is a well-known page of history. Before, however, John became “a gentle convertite”(d) and resigned his crown to the Pope, that monarch had invoked the interference of Rome to stay the irruption of King Philip in Normandy.

A “denunciatio” was made by John to Innocent III. against Philip, charging him with the breach of a truce made between France and England.

Innocent wrote on behalf of John to Philip, who returned for answer that the Pope had no right to interfere between Kings, or between him and his vassal. Then Innocent, in *the year 1204, issued the
 [*311] Decretal,(e) beginning “Novit ille,” which may be divided into three parts:—1. An assertion of the general principle of Papal jurisdiction in these matters, viz., that though he had no jurisdiction “judicare de feudo,” yet he had “decernere de peccato;” that John had, according to the Scripture, “told to the Church”(f) the offence of his brother King, and the Pope, therefore, “ad regimen universalis Ecclesiæ vocati,” must hear the cause by himself or his legate. That his power to do so was the gift of God, not of man; that there was no exemption for Kings any more than for private persons; that the Emperor Theodosius had even laid down in his Code that at any time, and in any suit, the appeal of either plaintiff or defendant to Rome put an end to every inferior jurisdiction.

2. That a charge of breach of faith to a treaty (*rupta pacis fœdera*) no doubt appertained, *ratione causæ*, to the Church.

(c) Walter thinks that this Decretal says no more than that Christendom was divided between the authority of the King and the Church—that the Pope was at the head of the Church, and therefore the central point of spiritual life.—Kirchenrecht, s. 41.

(d) King John, act v. sc. 1.

(e) Decret. Greg. ix. l. 2, t. i. c. xiii.

(f) St. Matthew, c. xviii.

3. Therefore “*prædicto Legato dedimus in præceptis, ut (nisi Rex ipse vel solidam pacem cum prædicto Rege reformet, vel saltem humiliter patiat, ut idem Abbas et Archiepiscopus Bituricen de plano cognoscant, utrum justa sit quærimonia, quam contra eum proponit coram Ecclesia Rex Anglorum, vel ejus exceptio sit legitima, quam contra eum per suas nobis literas duxit exprimendam) juxta formam sibi datam à nobis procedere non omittat.*”

The legate accordingly went to Meaux, held a council there, and began to proceed against Philip by *censures*. The French Bishops appealed to Rome; the appeal was received. The representative of the Bishops appeared; John was cited, and, not appearing, the cause was decided, in pain of his contumacy, in favour of France, and the crown of England was in consequence stripped of the greatest part of its continental possessions. (*g*)

*CCCV. The Emperor Frederic II., who began his reign A. D. 1212, waged nearly a forty-years' war with the pretensions of [312] Rome.

The end of the contest is well known. He was deposed on the 17th July, 1245, by a sentence of Innocent IV., with the advice of the Council at Lyons. All his subjects were released from their obedience; all who might hereafter aid him were excommunicated. The sentence was duly placed by Boniface VIII., under the title “*de sententia et re judicata*,” in the sixth book of the Decretals; (*h*) it is known by the title *ad Apostolicæ*.

Four principal premises are stated for the conclusion of the sentence:—

1. His frequent *perjury*, shown in violating the peace between the Church and the Empire.

2. His *sacrilege*, in imprisoning certain cardinals and prelates on their way to the council, convened by Innocent's successor.

3. A vehement suspicion of heresy. (*i*)

4. He had harrassed both ecclesiastics and laymen in the kingdom of Sicily, which he held as a fief from the Pope, and which he had exhausted by his tyranny.

5. He had entered into negotiations with the Saracens, and carried on a criminal intercourse with Saracen women.

The Pope, it will be seen, founded his right to judge, and his power to depose kings, upon the declaration of our Lord to St. Peter: “Whatsoever thou shalt bind on earth shall be bound in heaven.” (*j*)

The condemnatory part of the sentence is as follows: (*k*)— [313]
*Nos itaque super præmissis, et quampluribus aliis ejus nefandis

(*g*) Phillipps, K. R. iii. 238.

(*h*) L. 2, t. 14. The Bullarium (Cocquelines, Romæ, 1740) contains some *various* but unimportant *readings* of this sentence.

(*i*) “De hæresi quoque non dubiis et levibus sed difficilibus et evidentibus argumentis suspectus habetur.” This is pretty much in the style of Dogberry's reasoning, “Masters, it is proved already that you are little better than false knaves; and it will go near to be thought so shortly.”—Much Ado about Nothing, act iv. sc. 2.

(*j*) St. Matthew, c. xvi. ver. 19.

(*k*) The avowed objects of convening this First Council of Lyons were to take

excessibus, cum fratribus nostris et Sancto Consilio deliberatione præhabita diligenti (cùm Jesu Christi vices licet immeriti teneamus in terris, nobisque in B. Petri personâ sit dictum: Quodcunque ligaveris super terram, ligatum erit et in cœlis :) memoratum Principem qui se imperio et regnis, omnique honore ac dignitate reddidit tam indignum, quique propter suas iniquitates à Deo, ne regnet, vel imperet, est abjectus, suis ligatum peccatis, et abjectum, omnique honore ac dignitate privatum à Domino ostendimus, denunciamus, et nihilominus sententiando privamus: omnes, qui ei juramento fidelitatis tenentur adstricti, à juramento hujusmodi perpetuò absolventes: auctoritate Apostolica firmiter inhibendo, ne quis quamde cætero sibi tanquam Imperatori vel Regi pareat *vel quomodolibet parere intendat.*(*l*) Decernendo quoslibet, qui ei deinceps velut Imperatori vel Regi consilium vel auxilium præstiterint, seu favorem, ipso facto excommunicationis sententiæ subjacere. Illi autem, ad quos in eodem imperio Imperatoris spectat electio, eligant libere successorem. De prefato Sicilia regno providere curabimus, cùm eorumdem fratrum nostrorum consilio, sicut viderimus expedire.”(*m*)

This sentence was received as law in various parts of Christendom; and though Frederic II. maintained a strong party in the Empire to the last, the sentence was published in England by Henry III., and the Ecclesiastical Princes of Germany elected a new King of the Romans.

CCCVI. The Second Council of Lyons, held thirty years afterwards, decided upon the confirmation of the election of the Emperor Rodolph, the renunciation of Alphonso, King of Arragon, to the Imperial dignity, [**314*] and the excommunication *of those who should interfere with a priest publishing Ecclesiastical censures against a Sovereign.(*n*)

CCCVII. It will have been observed that the sentence upon the Emperor Frederick II. was given by the advice of the Council at Lyons; and we find the second Council of Lyons taking cognizance of questions of great secular importance. The Œcumenical Councils(*o*) had, in course of time, become a tribunal, before which were discussed the principal International affairs of Christendom, not only articles of faith and matters of religion, but the conduct of Princes, their trial and punishment, the precedency and rank of nations, and the disputed successions to kingdoms. The Councils generally were called, even by Voltaire,(*p*) the Senate of Europe.

The canonists define a Council to be an assembly of prelates and doctors, to settle matters concerning religion and the discipline of the Church.(*q*)

These Councils admit of various subdivisions, into (1) General Coun-

into consideration the abuses of the Church and the defence of Constantinople, then threatened by the Turks.—See the History of the Council at length, Matthew Paris, 663, &c. Ward's Law of Nations, ii. 59–71.

(*l*) The words in Italics are in the Bullarium. Vide ante, n. (*h*.)

(*n*) Phillips, in his Kirchenrecht, published 1850, laments the necessity, but defends the authority and lawfulness, of the Pope's sentence.—B. 3, pp. 221–3.

(*n*) Ward, ii. 73.

(*o*) Ward, ib. 55, 56.

(*p*) Essai sur les Mœurs et l'Esprit des Nations, ch. lxvii.

(*q*) Monsieur Durand de Maillane's Dictionnaire de Droit Canonique, tome premier, titre CONCILE.

cils, (2) National Councils, (3) Provincial Councils, (4) Diocesan Councils. It is only, however, with General Councils that International Law is concerned.

These Œcumenic or General Councils are divided into (α) those which form a portion of the *Corpus Juris Canonici* (the effect of which upon International Law will presently be noticed,) and (β) those which have been held subsequent to these compilations.

With respect to the former, there have been—

(α) *Eight General Councils in the East.*

1. Nice (1)		325
2. Constantinople (1)		381
3. Ephesus		431
4. Chalcedon		451
5. Constantinople (2)		553
6. Constantinople (3)		680
7. Nice (2)		787
8. Constantinople (4)		869

* *Seven General Councils in the West.*

[*315]

9. Lateran (1)		1123
10. Lateran (2)		1139
11. Lateran (3)		1179
12. Lateran (4)		1215
13. Lyons (1)		1245
14. Lyons (2)		1274
15. Vienne		1311

With respect to the latter, there have been (β) six General Councils, "*quorum nulla in corpore juris mentio fit.*"

16. Pisa		1409
17. Constance		1414
18. Basle		1431
19. Florence		1439
20. Lateran (5)		1512
21. Trent		1545

It is manifest that a much greater International(r) authority and influence is to be ascribed to the Councils of the Undivided Church, than to those which have been held by one branch only of the Church.

With respect to the four first Councils, Justinian decreed that the canons contained in them should be observed as laws;(s) and the Canon

(r) It is probably with reference to these Councils, that Grotius says: "Synodici canones qui recti sunt, collectiones sunt ex generalibus legis divinæ pronuntiationibus, ad ea, quæ occurrunt, aptatæ; hi quoque aut monstrant, quod divina lex præcipit, aut ad id, quod Deus suadet, hortantur. Et hoc vere Ecclesiæ Christianæ est officium, ea quæ sibi à Deo tradita sunt tradere et eo quo tradita sunt modo."—De J. B. et P. (Proleg.) 51.

(s) "Sancimus igitur, vim legum obtinere sacros ecclesiasticos canones in sanctis quatuor synodis expositos vel confirmatos, hoc est in Nicænâ trecentorum

Law declares "*Inter cætera Concilia, quatuor esse scimus venerabiles Synodos, quæ totam principaliter fidem complectuntur, quasi quatuor Evangelia, vel totidem Parasidi flumina.*"^(t)

[*316] *In England, the Legislature enacted that the High Commissioners appointed by Queen Elizabeth, should have no power to "adjudge any matter or cause to be heresie, but only such as have heretofore been determined, ordered, or adjudged to be heresie, by the authority of the Canonical Scriptures, or by the first four General Councils, or any of them, or by any other General Council wherein the same was declared heresie by the express and plain words of the said Canonical Scriptures, or such as hereafter shall be ordered, judged, or determined to be heresie, by the High Court of Parliament of this realm, with the assent of the Clergy in their Convocation."^(u)

The International character of these General Councils is nowhere more forcibly stated than in the work of a celebrated English divine:—

"Now as there is great cause of communion, and consequently of laws, for the maintenance of communion amongst nations, so, amongst nations Christian, the like in regard even of Christianity hath been always judged needful. And in this kind of correspondence amongst nations, the force of General Councils doth stand. For, as one and the same Law Divine, whereof in the next place we are to speak, is unto all Christian Churches a rule for the chiefest things, by means whereof they all in that respect make one Church, as having all but one Lord, one faith, and one baptism,^(x) so the urgent necessity of mutual communion for preservation of our unity in these things, as also for order in some other things convenient to be every where uniformly kept, maketh it requisite that the Church of God here on earth have her laws of spiritual commerce between Christian nations—laws, by virtue whereof all Churches may enjoy freely the use of those reverend, religious, and sacred consultations, which are termed Councils General. *A [*317] thing whereof God's own blessed Spirit was the Author;^(y) a thing practised by the holy Apostles themselves; a thing always afterwards kept and observed throughout the world; a thing never otherwise than most highly esteemed of, till pride, ambition, and tyranny began, by factions and vile endeavours, to abuse that divine intention unto the furtherance of wicked purposes. But, as the just authority of civil courts and parliaments is not therefore to be abolished, because sometimes there is cunning used to frame them according to the private intents of men over-potent in their commonwealth, so the grievous abuse which hath been of Councils should rather cause men to study how so gracious a thing may again be reduced to that first perfection, than in regard of stains and blemishes, sithence growing, be held for ever in extream dis-

decem et octo, et in Constantinopolitanâ centum quinquaginta sanctorum patrum, et in Ephesinâ primâ, in quâ Nestorius condemnatus est, et in Chalcedonensi, in quâ Eutyches cum Nestorio anathemate percussus est. Prædictarum enim sacramentorum synodorum et dogmata ut sacras scripturas suscipimus, et canones tanquam leges observamus."—Nov. cxxxi. 1.

(t) Decret. I. Dist. xv. c. i. s. 1, et vide c. ii.

(u) 1 Eliz. c. i. s. 36.

(y) Acts xv. 28.

(x) Ephes. iv. 5.

grace. To speak of this matter as the cause requireth, would require very long discourse. All I will presently say is this, whether it be for the finding out of anything whereunto Divine Law bindeth us, but yet in such sort, that men are not thereof on all sides resolved; or for the setting down of some uniform judgment to stand touching such things, as being neither way matters of necessity, are notwithstanding offensive and scandalous, when there is open opposition about them; be it for the ending of strifes, touching matters of Christian belief, wherein the one part may seem to have probable cause of dissenting from the other; or be it concerning matters of polity, order, and regiment in the Church, I nothing doubt but that Christian men should much better frame themselves to those heavenly precepts which our Lord and Saviour with so great instancy gave^(z) as concerning peace and unity, if we did all concur in desire to have the use of ancient Councils again renewed, rather than these proceedings continued, which either make all contentions *endless, or bring them to one only determination, and that of all other the worst, which is by sword.”^(a) [*318]

It is manifest, however, that these Western Councils had become at the time of the deposition of Frederic, mere instruments for extending the power and avenging the quarrels of the See of Rome.

CCCVIII. In some sense, too, it may be observed, that the Universities of Europe have been considered the expositors of International Ecclesiastical Law. Philip III. of France invoked the aid of the University of Paris in his contest with Pope Boniface VIII., and, compelled the members of that learned society to examine into the pretensions of the Pope; and it is remarked by Spittler^(b) that a more dangerous enemy to the Papacy could not have been aroused, inasmuch as at that period Universities were indignant with the Pope, on account of the privileges which he had accorded to the Mendicant Orders, and which trenched upon the academical rights. The Universities were also resorted to by Henry VIII., at the suggestion of Cranmer, to obtain the much-desired divorce from his innocent wife; and after the lapse of nearly three centuries, by Mr. Pitt, in order to ascertain what the opinions of Roman Catholics were, as to the alleged conflict between their allegiance to the Pope and to their temporal Sovereign, previously to the removal of their civil disabilities in England.^(c)

CCCIX. To return, however, to the task of tracing the continuous development of the claims of Papal authority over independent States.

The connexion between France and Rome, which, before the tenth century, had been so intimate, and which after that period, had been exchanged for the alliance of Germany, was again renewed after the quarrel with the race of Hohenstaufen.

*Various Popes, as has been stated, had taken refuge in France since the reign of the Emperor Henry IV.; and at the time when Frederic II. was dethroned, St. Louis reigned in France. But the grand- [*319]

(z) John xiv. 27.

(a) Hooker, Ecclesiastical Polity, B. i. s. 10.

(b) Geschichte des Papstthums (1828,) p. 172.

(c) Vide post.

child of St. Louis was by no means disposed to submit to the authority which the Popes had claimed in Germany.

Philip IV. (the Handsome) discovered the necessity of taxing his clergy as well as his laity, in order to defray the expenses of his wars with Edward I. of England.

The (d)Third (1179) and (e)Fourth (1215) Councils of Lateran had laid down the principle that the State had no authority whatever over the property of the Church.

Boniface VIII. sought to enforce this maxim against Philip IV. in a Decretal fulminated in 1296, which certainly begins with the assertion of a very unconciliating proposition:—

“*Clericis Laicos infestos oppidò tradit antiquitas, quod et præsentium experimenta temporum manifestè declarant, dum suis finibus non contenti nituntur in vetitum, ad illicita fræna relaxant, nec prudenter attendunt, quàm sit eis in Clericos Ecclesiasticasve personas et bona interdicta potestas.*”(f) It went on to declare that all secular authorities imposing, and all spiritual authorities paying, any taxes (it must be assumed, according to the defenders of the Decretals, to speak only of new taxes,) without the authority of the Holy See, should incur excommunication *ipso facto*, from which they should not be relieved even *in articulo mortis*, without the special license and authority of the Pope, “*cum nostræ intentionis existat, tam horrendum secularium potestatum abusum nullatenus sub dissimulatione transire.*”

CCCX. In A. D. 1304, Benedict XI., the gentle successor of the arrogant Boniface, by a Decretal beginning “*Quod olim,*”(g) &c., took away the punishment from the clergy who payed new taxes, provided that they [*320] had first *deliberated in Synod, and agreed that the tax was imposed on account of necessity, or for the general good; and even in that case the Pope was to be first consulted.

CCCXI. Boniface VIII., by the Bull “*Ausculta Fili,*” further explained to Philip the Handsome that he and all other kings were subject to the Pope, and set before him many of his offences, especially his debasing the coin of his realm, and finally advised him to make peace with the Church and prepare for an expedition to the Holy Land. The text of Scripture upon which the Pope chiefly relied was this passage in Jeremiah (i. 10.):—“*See I have this day set thee over the nations, and over the kingdoms, to root out, and to pull down, and to destroy, and to throw down, to build, and to plant.*” The next step of Boniface was to call a Council at Rome, and, in 1302, to promulgate the famous Decretal beginning “*Unam sanctam,*”(h) in which, after setting forth various texts, one from the Canticles,(i) one from the Psalms,(k) and especially “*feed my*

(d) Can. 19.

(e) Can. 44.

(f) Sexti Decret. l. 3, t. 23, c. iii.

(g) Extravag. Comm. l. 3, t. xiii. De Immunitate Ecclesiarum.

(h) Extravag. Comm. l. 1, t. viii. De Majoritate et Obedentiâ. “*Unam sanctam Ecclesiam,*” &c.

(i) “*My dove, my undefiled, is but one; she is the only one of her mother, she is the choice one of her that bare her.*”—Cantic. vi. 9.

(k) “*Deliver my soul from the sword, and my darling from the power of the dog.*”—Psalm xxii. 20.

sheep" from St. John's Gospel, and observing, by way, that if the Greeks or any other persons denied that they were under the care of St. Peter's successor, it was clear that they were not Christ's sheep, as there was but one shepherd and one sheep-fold, the Pope proceeded with the following unqualified averment of the entire and unquestionable subjection of all temporal power to the See of Rome:—

"In hac ejusque potestate duos esse gladios, spirituales videlicet et temporales, Evangelicis dictis instruimur. Nam dicentibus Apostolis, *Ecce gladii duo hic*: in Ecclesiâ scilicet, cum Apostoli loquerentur, non respondit Dominus nimis esse, sed satis. Certe, qui in potestate Petri temporalem gladium esse negat, male verbum attendit *Domini [*321] proferentis, *Converte gladium tuum in vaginam.*(l) Uterque ergo est in potestate Ecclesiæ, spiritualis scilicet gladius et materialis. Sed is quidem pro Ecclesiâ, ille verò ab Ecclesia exercendus. Ille Sacerdotis, is manu Regum et militum, sed ad nutum et patientiam Sacerdotis. Oportet autem gladium esse sub gladio, et temporalem auctoritatem spirituali subjici potestate. Nam cum dicat Apostolus: *Non est potestas nisi à Deo; quæ autem sunt, à Deo ordinatæ sunt*:(m) non autem ordinatæ essent, nisi gladius esset sub gladio, et tanquam inferior reduceretur per alium in suprema.

"Porro subesse Romano Pontifici omni humanæ creaturæ declaramus, dicimus, definimus et pronunciamus omnino esse de necessitate salutis. Dat. Laterani, Pontificatus nostri Anno 8."(n)

CCCXII. As Benedict XI. had softened the "*Clericis Laicos*" of Boniface by the subsequent constitution *Quod olim*, so the successor of Benedict, Clement V., being still more devoted to France, hastened to take off the edge of *Unam sanctam* by the Bull *Meruit* (1306),(o) which declared that *Unam sanctam* did not subject France more to Rome *than it had been subjected before; that no prejudice to royal [*322] or national rights was intended, and that all the relations of France to Rome should be considered "in eodem esse statu quo erant antè definitionem præfatam."

CCCXIII. In 1311, Clement V., in the Bull which begins "*Romani Principes*,"(p) and which is inserted among the Clementine Constitutions in the Corpus Juris Canonici, declares, in the most express terms, that the examination and approbation of the fitness of the Elector's choice, as well as the coronation of the Emperor at Rome, belongs "eidem Ecclesiæ, quæ à Græcis imperium transtulit in Germanos;"

(l) St. Matthew, xxvi.

(m) Romans, xiii.

(n) This Decretal, too, actually finds a modern champion in Phillips, who observes that "its object was to develop dogmatically, upon general principles, the relation between Church and State" (pp. 25-6): that it contained nothing new, but a recapitulation of maxims enunciated by former Popes and Fathers of the Church (256-259); that it contained merely a logical conclusion from undoubted premises (259-60.)—B. iii. Kirchenrecht. Walters, however, mentions it with sorrow and shame.—Kirchenrecht, s. 41. Packman considers it as dogmatical only, but does not defend it.—Kirchenrecht, i. 169. n.

(o) Extrav. Comm. l. 5, t. 7, c. ii. "Meruit clarissimi Filii nostri Philippi, Regis Francorum illustris, *sincera affectionis* ad nos et Ecclesiam Romanam *integritas*," &c.—Enough to have roused Boniface from the grave.

(p) Clement. l. ii. t. ix. De Jurejurando.

also, that the oath taken by the Emperor was not merely one which bound him to protect and defend the Pope, as the Emperor Henry VII. at this time contended, and which contention, “*si sub dissimulatione pertranseat, vel silentio pallietur, posset in magnum et evidens præjudicium Rom. Ecclesiæ redundare;*” and therefore the Pope decreed, in plain terms, that the oath was one of feudal allegiance and feudal vassalage, like that of the King of Naples, “*cum ipsi Reges ejusdem Ecclesiæ specialissimi filii, sibi juramento fidelitatis, et alias multipliciter essent adstricti,*” and that by it he was bound to extirpate all heretics and schismatics, never to enter into any relation or confederation with any one “*communione Catholicæ fidei non habente, aut cum aliquo alio præfatæ Ecclesiæ inimico, vel rebeli, seu eidem manifestè suspecto;*” and to maintain the whole property and jurisdiction of the Roman Church intact and secure, and to abstain from injuring any vassal belonging to it.

CCCXIV. The same Pope followed up this decree by another, beginning “*Pastoralis,*”(q) in which, annulling the procedure—a very unjust one, it must be admitted—of Henry against Robert, King of Naples, his Holiness expresses his unlimited and illimitable authority over all kingdoms as follows:—“*Nos tam ex superioritate, quam ad *imperium* [*323] *non est dubium nos habere; quam ex potestate, in qua, (vacante imperio,) imperatori succedimus: et nihilominus ex illius plenitudine potestatis, quam Christus, rex regnum et dominus dominantium nobis, licèt immeritis, in personâ beati Petri concessit, sententiam et processus omnes prædictos, et quidquid ex eis secutum est, vel occasione ipsorum, de fratrum nostrorum consilio declaramus fuisse ac esse omnino irritos et inanes, nullumque debere aut debuisse sortiri effectum.*”

CCCXV. After Henry’s death, which happened shortly afterwards, John XXII., the successor of Clement, issued (1316), a Bull beginning “*Si Fratrum,*”(r) and duly inserted in the Extravagantes of the Corpus Juris Canonici, wherein he asserted respecting the government of the empire, “*cum in illo ad secularem judicem nequeat haberi recursus, ad summum Pontificem, cui in personâ beati Petri terreni simul et cœlestis Imperii jura Deus ipse commisit;*” therefore all persons pretending to any authority not conferred by the Pope were excommunicated, all their acts and contracts voided, and all who obeyed them were subjected to the like punishment.

CCCXVI. The Extravagant *De Consuetudine(s)* of John XXII., at Avignon, in A. D. 1322, appears to crown the pillar of Papal pretensions, while it bears directly upon a most important point of International Law. It begins by the assertion that the Pope is placed by God over all kingdoms and nations; it represents that the Pope cannot personally perambulate all countries, therefore he must have lieutenants or legates to supply his place and exercise his power over the people committed to him; that some nations have said that legates could not be sent to them against their will, that they have a customary right to reject them; that

(q) Clement. l. ii. t. xi. c. 2. De Sententiâ et re judicatâ.

(r) Extravag. Joan XXII. t. v. Ne sede vacante aliquid innovetur.

(s) Extravag. Comm. l. i. t. i. c. 1.

there is, however, no such right, but that the attempt to exercise it draws down immediate excommunication upon the whole country.

*The words of the Bull should be carefully studied.

"Super gentes et regna Romanus Pontifex à Domino constitutus," &c. [*324]

"Qui verò de cætero super prædictis dictos Legatos, aut etiam Nuntios, quos ad quascunque partes pro causis quibuslibet sedes ipsa transmisserit, præsumperint impedire, ipso facto sententiam excommunicationis incurrant. Regna, terræ et loca quælibet subjecta eisdem, tamdiu sint eo ipso Ecclesiastico supposita interdicto, quamdiu in hujusmodi contumacia duxerint persistendum. Non obstantibus quibuslibet indulgentiis, aut privilegiis, Imperatoribus ac Regibus, seu quibuscunque modis, tenoribus et formis à sede ipsâ concessis, quæ contra præmissa nullis volumus suffragari."

CCCXVII. The authority shown from the foregoing extracts of the Canon Law, to have been claimed and exercised by the Popes, has long ago been pronounced by the voice of International and Public Law to be altogether irreconcilable with the peace and independence of nations.

Nevertheless it is important, and especially at the present time, to show what claims have been made, what authority has been exercised by the Roman See. For this authority has never been distinctly repudiated by the successors of the Popes who actually exercised it; it still forms a part of the body of Canon Law, taught as the jurisprudence of the Roman Church, however rejected by national churches of that communion. Two hundred years and more after these edicts were promulgated, able advocates were found to defend, under the sanction and patronage of the Roman See, the literal meaning and the full extent of their provisions.

In the year 1729, the Neapolitan Government interfered, by royal edict, to prevent a service being celebrated in honour of Gregory VII. (Hildebrand), in which his deposition of the Emperor Henry IV. was commemorated and extolled as a lawful exercise of Papal power.^(t) At this day, even in *France, men of no mean ability are found to maintain that these decrees admit of a merely spiritual and a [*325] perfectly defensible interpretation. Some writers are found to admit that they can only receive a temporal interpretation, but that they are, nevertheless, perfectly justifiable.^(u)

When the great Portuguese canonist, Barbosa, in the early part of the

(t) Vide post.

(u) "When, then, we find a sovereign Pontiff judging, condemning, and deposing a secular Prince, releasing his subjects from their obligation to obey him, and authorizing them to choose them another King, we may regret the necessity for such extreme measures on the part of the Pontiff, but we see in them only the bold and decided exercise of the legitimate authority of the spiritual power over the temporal; and instead of blushing for the chief of our religion, or joining our voice to swell the clamour against him, we thank him with our whole heart for his fidelity to Christ, and we give him the highest honour that we can give to a true servant of God and benefactor of mankind. It is not the sainted Hildebrand, nor the much-wronged Boniface, that we feel deserves our apology or our indignation, but Henry of Germany and Philip the Fair of France."—Telegraph Newspaper, October, 1853.

seventeenth century, endeavoured to show that the *Unam sanctam*, &c., had only a spiritual signification, he was obliged to confess that he was combating the contrary opinion of almost every expositor of the Canon Law.(x)

[*326] *Nor, indeed, is the controversy of much consequence, for the same author admits that though the Pope has no direct power in temporal matters, yet he has it "*casualiter et indirectè in ordine ad spiritualia quoties scilicet ad spirituale forum fuerit necessaria*;" and he consistently maintains(y) that the deposition of the German Emperors, the transference of their kingdoms to others, the abrogation of civil laws in any way adverse to spiritual good, the donation of infidel countries to Portugal and Spain, were perfectly legitimate acts of Papal supremacy.(z) It is much in the same spirit that modern Ultramontane writers(a) write and act at the present time. These decretals, it must be remembered, were enacted by an authority which a large and a most devoted portion of Romanists hold to be infallible. They are taught in books, ancient, mediæval and modern, dedicated to Popes, and published under Papal sanction. They are defended at this day by various learned writers and commentators as having a spiritual character only; by others as being a proper exertion of authority at the time. The question arises, have they ever been repudiated by the authority which enacted them?—are the teachers of Canon Law at Rome ordered to declare that they are obsolete, and that they were or are contrary to the rights of nations?—are there any editions published by authority, in which these passages are omitted, explained, or censured?—have they like the bad laws of civil states, been repealed? Till these questions can be answered in the affirmative, the Governors of States, who see the present state of revived Ultramontanism, must superintend with vigilance and jealousy the promulgation of the Canon Law in their dominions.

[*327] *It has been also said, both by the infidel philosopher and by the Ultramontane divine,(b) that this authority, at the time of its

(x) "*Nec etiam nos deterrent pleraque jura, quæ juxta omnium ferè Doctorum mentem, summo Pontifici tribuere videntur secularè potestatem ut in cap. i. distiactio 22, et in Extravag. Unam sanctam,*" &c.—*De Off. et Pot. Episcopi*, p. 110, t. iii. c. 2.

"Il n'est pas vrai que les Papes aient jamais pretendu la toute-puissance temporelle."—*De Maistre, Du Pape*, c. viii. Walter, however, says, with praiseworthy love of truth, "*Geistlose Schriftsteller, wie sie auch andere Höfe erzeugen, gründeten, gefällig gegen die herrschenden Umstände, Forderungen und Systeme auf das, was aus freier Huldigung hervorgegangen, nur durch Weisheit und Mässigung erhalten werden konnte. Die Päpste erlangten vom Kaiser einen wahren Lehnseid, von der weltlichen Gewalt die unbedingte Unterwürfigkeit unter die Geistliche. Da wandten sich die Fürsten und Völker von ihnen ab,*" u. s. w.—*Kirchenrecht*, Abschn. 41.

Mr. Bowyer also admits that the Decretals, as well as the other works composing the *Corpus Juris Canonici*, contain passages, decisions, and principles, tending to establish the authority of the Popes over the temporal civil rights of Kings and States—a doctrine contrary to the public law of Europe, and, indeed not maintained by the Roman Church, though it has been asserted by individual doctors."—13th Reading, p. 164.

(y) *De Off. et pot. Episcopi*, ib. p. 111.

(z) C. 2, passim. *De primatu Ecclesiæ Romanæ super omnes, et de Supremâ summi Pontif. potestate in universum orbem*. The work is dedicated to Urban VIII. (1623.)

(a) Packmann, 133.

(b) *De Maistre*, p. 249, citing Voltaire.

promulgation and exercise, was eminently beneficial to the world; that the spectacle of princes and nations submitting their quarrels to the arbitration of the chief minister of the Gospel of Peace, was one which the bloody wars of later times have given Christendom good reason to regret; that a perfect tribunal of International Law was established in the Vatican, and the only common judge, which independent nations could acknowledge, was presented in the person of the Pope. Nor can it be denied that this authority often protected the oppressed, humbled the oppressor, stayed the shedding of blood, cherished peace, and prevented war, at a period when the barbarous manners and savage passions of men would have yielded to no other influence.^(c) "It is impossible," says a very learned and accomplished dignitary of the English Church, in a recent publication, "to conceive what had been the confusion, the lawlessness,^(d) the chaotic state of the middle ages without the mediæval Papacy." Nevertheless, experience and history demonstrate that this authority was one which no mortal hands were made to wield. Had the practice corresponded with the theory of this great tribunal, it is conceivable that *the foundation of its manifestly beneficial authority might never [*328] have been scrutinized. But for such a tribunal, the most perfect disinterestedness, the most entire freedom from the suspicion of ambition, personal and pontifical, the most unspotted character, the most innocent unworldly life, the most ardent love of justice, the most fearless disregard of persons, were indispensably and perpetually requisite. It was not enough that some of these qualities should be possessed, or that some Pontiffs should possess them, there must be a security that none but those who possessed them should ever be placed upon the judgment seat of the world. But an Italian Sovereign, mixed up with the quarrels of his neighbours, seeking the aggrandizement of his own territories, relying for his claim upon forged credentials, founding his authority upon false decretals, at one time the instrument of the ambition of Germany, at another of France, residing in Avignon, contending with a rival Pope at Rome who possessed apparently equal credentials, fighting like Julius II., infamous beyond expression, like Borgia, worldly and luxurious, like Leo, and in much later times refusing to recognize, as in the case of Prussia and Spain, the Sovereigns chosen by the constitutional law of independent kingdoms, such a Sovereign was palpably unfit to be the unappellable dispenser of International Law. It became evident that the unquestionable virtues, the sanctity of morals, the great abilities of many Pontiffs, could not cure the inherent defects in the tribunal itself.

(c) "Ils exercèrent une *dictature* salulaire, qui laissa respirer les peuples, et prépara la renaissance de l'ordre social. Mais les exemples qui seraient tirés d'un état de choses *essentiellement transitoire*, ne sauraient légitimer des prétentions inconciliables avec le but et la nature des sociétés civiles, le véritable esprit de l'Eglise et sa mission divine."—Discours, &c. par F. Portalis, Introd. vi. Paris, 1845. De Maistre, 203-4, 265.

(d) Milman's History of Latin Christianity, vol. i. p. 430; "and (he adds) of the mediæval Papacy, the real father is Gregory the Great." But this is perhaps, rather too broadly stated; at least, it should be remembered that he strongly protested against the virtual absorption of all the Episcopates into one. His Papacy extended from A. D. 590 to 604.

Then came the time when the credentials of this superhuman authority were demanded and investigated. A few isolated, if not distorted, texts of Scripture were not sufficient to countervail the silence, much less the contrary practice of primitive antiquity; and the modern theory of development, so much used in our days, for different purposes, both by the Infidel and the Ultramontanist, was not yet developed.

[*329] CCCXVIII. That there should be some authoritative repudiation *of the portions of the Canon Law which we have been considering, appears the more necessary, when it is remembered, that as late as the year 1773, some of the most extravagant claims of the Papacy were formally promulgated in the Bull, which is entitled *In Cœnâ Domini*, and is also known as *Pastoralis*, and which at one time greatly disturbed the peace of Europe.

CCCXIX. The Bull(e) called *In Cœnâ Domini* was published at Rome every Holy Thursday.

It is a maxim of Ultramontane canonists, at variance with the general doctrine of the Civil and Canon Law, that what is published at Rome is published all over the world, consequently *ignorantia juris neminem excusat*.

The Ultramontane canonists say that the Bull is so ancient that its origin cannot be discovered. It appears that there is a copy in the Vatican of the Bull of Gregory XI. (A. D. 1370,) and the date of this famous instrument cannot be traced further back. The Bull does not relate to dogmas, but to discipline, and therefore even some Ultramontane canonists admit that it does not bind the conscience in countries where it has not been received. If so, it would bind only the consciences of the subjects of the Pope, for it appears to have been refused admittance by the Governments of every independent State.

[*330] *In France,(f) M. Pithou made its rejection the subject of a particular article(g) of the liberties of the Gallican Church. But in the province of Roussillon the Bull appears to have been formally published, till the 21st March, 1763, when by an *arrêt du conseil souverain*, it was suppressed, and prohibited for the future. Indeed the Parliament of France were so stout in their opposition to the introduction of this Bull, that on an occasion, when their suspicions were aroused that certain persons intended to introduce it into the kingdom, they confiscated the temporalities of certain bishops, and treated as State criminals those who obeyed them: for the French thought that though the Bull was

(e) Fleury, Hist. Eccles. t. xxxiv. 1, 169, s. 22.

D. de Maillane, i. pp. 376-7. This author, writing in 1770, mentions the Bull as being annually published—"qu'on publie aujourd'hui." Leber, Pièces relatives à l'Histoire de France, t. iii. p. 302. Van Espen, Tract. de Promulg. St. Eccles. par. 3, cap. 2, 2. Reiffenstuel, Jus Canon. Univ. v. c. 5. Giannone, Ist. di Napoli, l. 33, cc. 3, 4, 5, 6.

Thuani, Historiarum sui Temporis (ed. Londini, 1733.) T. ii. 673-4. Bull *In Cœnâ Domini*, promulgated by Pius V.; forbidden by Philip, evaded by Venice.

T. iii. 816. Promulgated by certain French Bishops, forbidden by Parliament of Paris.

(f) Papers laid before Parliament (vide post,) 1816-17, pp. 178-9. Requisition of the Attorney-General Seguier.

(g) Art. 17.

injurious to all Sovereigns, it was especially detrimental to the prerogatives of the French crown and the liberties of the French Church.

CCCXX. The preamble of this famous Bull^(h) opens with the obligation of the Roman Pontiff to preserve the Catholic faith in its integrity. The provisions which follow are the following:—

1. It excommunicates and anathematizes heretics of whatever sect, and their abettors, as well as those who read and print their books, and, lastly, schismatics.

2. Also all persons and universities which appeal to a future council.

3. *Also pirates, corsairs, and maritime freebooters.

4. Also those who seize the chattels of shipwrecked parties in [*331] whatever region.

These two last provisions are curiously illustrative of the Pope's claim to be supreme International Judge, which has been already commented upon.⁽ⁱ⁾

5. Also those who impose new tolls or augment old ones, without the license of the Pope.

6. Also those who forge Apostolic letters and petitions, as well as those who utter forged letters.

7. Also those who supply the Saracens or Turks, or other enemies of the Christian name, with arms or aid.^(k)

A provision which would operate very inconveniently for Roman Catholic, as well as Heretic States at the present moment,^(l) unless, indeed, the fact of the Turks being aided against the schismatic might be considered a *casus omissus* in the Bull.

8. Also those who obstruct the conveyance of victuals and other supplies for the use of the *Curia Romana*.

9. Also those who persecute persons coming to the Roman See, or sojourning at the Roman Court.

10. Also those who in any way molest pilgrims coming to Rome for purposes of devotion.

11. Also those who injure the Cardinals of the Holy Roman Church, or other ecclesiastical dignitaries.

12. Also those who injure persons having recourse to the Roman Court in matters of business, and also pleaders of causes.

13. Also those who appeal to the Secular Power against the execution of the Letter Apostolic.

14. Also those who remove causes touching spiritual matters from the

(h) The Bull In Cœna Domini, translated, &c. Papal Diplomacy and the Bull In Cœna Domini, &c. (Hatchard, London, 1848.)

A Letter to Mr. Plumptre on the Bull In Cœna Domini, by the Earl of Arundel and Surrey. (Dolman, London, 1848.)

A Letter to the Earl of Arundel and Surrey on the Bull In Cœna Domini. (Hatchard, London, 1848.)

Report from the Select Committee (1817,) p. 123, &c.

In the pamphlet above referred to ("the Bull In Cœna Domini") will be found cited, as authorities for the text of the Bull, the following works:—*Bullarium Romanum*, op. Cherubini, viii. fol. Luxembourg, 1727. *Id.* op. Cocquelines, xiv. Romæ, 1739–44. *Bullarium S. D. N. Benedicti Papæ*, xiv. t. iv. Venetiis, 1778. *Bullarii Rom. continuatio*, viii. 1835–44.

(i) Vide ante, vol. i. p. 82.

(k) *Ib.*

(l) September, 1854.

[*332] delegates of the Apostolic See, and other *ecclesiastical judges, or who obstruct the proceedings of the said judges.

15. Also secular judges, who bring before their tribunals ecclesiastical persons, or who publish or execute ordinances and pragmatics prejudicial to the ecclesiastical liberty.

16. Also those who obstruct prelates and ecclesiastical judges in the exercise of their jurisdiction; those who have recourse to the secular as a protection against the ecclesiastical courts, and those who aid and abet them.

17. Also those who usurp and sequester the revenues of properties belonging to the Holy See and to the Church.

18. Also those who exact contributions from ecclesiastical persons and goods, and their aiders and abettors.

19. Also secular judges who interfere in criminal causes against ecclesiastical persons.

20. Also those who occupy the city of Rome, and other cities, provinces, and places belonging to the Roman Church, and who usurp her jurisdiction.

In this category are included, among other territories, the kingdom of Sicily, the islands of Sardinia and Corsica.

21. Decrees that this Bull shall continue in force until another similar process be issued by the Pope for the time being, and that no one shall obtain absolution from the sentences of this Bull from any other than the Pope, unless he be *in articulo mortis*, and then only after surety given for obedience to the mandates of the Church, and for satisfaction to be made.

Another article provides that the affixing of this Bull to the door of St. Peter's and St. John of Lateran, shall have the effect of a personal service upon everybody.

CCCXXI. There has been much dispute whether this Bull be now in force, or whether it requires an annual publication for that purpose. The English Roman Catholics maintain that it is obsolete,^(m) and [*333] requires a promulgation to revive it; *though those provisions in it which were to be found in other Bulls, of which, indeed, it is a compilation, are still binding.

The language of canonists, and especially of Reiffenstuel,⁽ⁿ⁾ would seem to warrant a contrary conclusion. Practically speaking, it is, no doubt, dormant for the present. It will be presently seen what a general resistance from all independent States the last attempt to promulgate it excited.

(m) Letter of Lord Arundel, p. 4.

(n) Letter of Lord Arundel, p. 6.

*CHAPTER V. [334]

THE INTERNATIONAL STATUS OF THE PAPACY BETWEEN THE PERIOD OF THE PROMULGATION OF THE CANON LAW AND THE COUNCIL OF TRENT.

CCCXXII. THUS, at the close of the thirteenth century, the Papal power had reached its utmost height. It had carried to the extremest practical verge the logical consequences of the principles laid down in the Bulls which have been mentioned.(a)

The kingdoms of the earth were at the disposal and under the supremacy of the servant of the servants of God.

About the beginning of the fourteenth century, the flagrant abuse of Pontifical authority began to cause its rapidly accelerating downfall.(b)

Philip IV. of France burnt the Bull of Boniface VIII. which invaded the Regalia of the French crown,(c) defied his *excommunication, and appealed to a General Council.(d) The contumacy and [*335] cruelty of Clement VI. towards the Emperor Louis of Bavaria, roused the Princes and States of the Empire, and produced the celebrated decree of the Diet of Frankfort, A. D. 1338.(e) In this decree, which became a Fundamental Law of the Empire, it was declared that the Imperial Dignity was derived from God alone, and that the Emperor, once chosen by a plurality of the suffrage of electors, needed no confirmation or coronation of the Pope, and that to maintain the contrary should be considered a crime of high treason.(f)

CCCXXIII. Another event greatly injured the Papal authority. Clement V., who had been Archbishop of Bordeaux, was crowned at Lyons, and took up his abode at Avignon(g) A. D. 1305, and there his successors continued till A. D. 1378.(h)

The Pope was accused, not without reason, after abetting the persecution of the Templars, of being the tool of the French Kings.

(a) Discours, Rapports, et Travaux inédits sur le Concordat de 1801, &c., par J. E. M. Portalis, publiés et précédés d'une Introduction, par le Vicomte Frédéric Portalis. Paris: 1845.

(b) Shakspeare has admirably painted the spirit of these times in the answer to Pandulph, which he puts into the mouth of the Dauphin Lewis:—

“Your Grace shall pardon me. I will not back;
I am too high-born to be *propertied*,
To be a secondary at control,
Or useful serving-man, and instrument
To any sovereign State throughout the world,” &c.
King John, act v. sc. 2.

(c) A. D. 1302. 1 Koch, 224.

(d) 1 Koch, 225.

(e) Raynaldus, A. D. 1346, n. 7.

(f) Leibnitz, Cod. Juris. Gent. Dipl., part i. p. 149.

(g) See the instrument of sale by which Joanna, Queen of Sicily, transferred Avignon to Clement VI., A. D. 1358. 1 Schmauss, C. J. A. 50.

(h) In 1376, Gregory XI. returned to Rome. Then, as the Italians said, the seventy years of the Babylonish Captivity ceased.—3 Phillipps, 331.

If the State during the preceding century had dwelt in the house of the Roman Church, the host and guest had certainly changed places.⁽ⁱ⁾

Towards the end of the fourteenth century, Schism tore the Papacy in pieces. Christendom was divided between Popes contemporaneously chosen at Avignon and at Rome; at one time a third Pope was chosen at

[*336] Pisa,^(k) so that three *Pontiffs claimed at one and the same time the undivided spiritual allegiance of Christendom. The Avignon and Roman Schism lasted from 1398 to A. D. 1417.

The Ecclesiastical Council of Constance (A. D. 1414), deposed the Popes of Avignon, and procured the resignation of the Popes of Rome, and at its fifth session declared the superiority of the authority of an Universal Council to the Pope; nevertheless, it was thought indecent to take further proceedings while no visible chief of the Ecclesiastical State existed. At Colonna, Marten V. was elected, and prepared his own scheme of reform; but this was not agreeable to the clergy of England, France, Germany, Italy, and Spain, who were assembled at Constance. The Council of Basle was therefore convened, at which Annates and various Papal exactions were abolished, and the liberty of appeals to Rome greatly circumscribed.^(l) Eugenius IV., the successor of Marten, dissolved the Council twice, once under the allegation of opening a communication with the Greek Church.^(m) Another Schism happened, another Pope (Felix V.) was chosen by the prelates who remained at Basle. He subsequently resigned, and at last, about A. D. 1449, the Council discontinued its sittings, and the Popes since this period have been resident, except during the captivity in France of Pius VI. and VII., at Rome.⁽ⁿ⁾

CCCXXIV. The question now arises, how were the International relations of independent States with the Roman See affected by these great and significant events?

[*337] *The time had fully arrived when neither—to use the expression of modern canonists—the hierocratic nor the territorial system could exclusively prevail, when the Church was to be considered as standing by the side, as it were, of the State, subject to it in all temporal matters whatever, but not incorporated in the State, as in the days of Constantine, Justinian, and Charlemagne, or altogether absorbing the State, as in the days of the Gregories and Innocents. It is no longer necessary, for the explication of this difficult subject, to record minutely the changes of dynasties and the vicissitudes of national fortunes.

The age of Pragmatics, of Pragmatic Sanctions, and of Concordats

(i) The history of the Papal residence at Avignon was not lost upon Napoleon. He was well aware of the advantages which the Pope's residence in France gave to its Monarch, and had at one time determined to revive the French Popedom. Vide post.

(k) A. D. 1409.

(l) Bossuet, *Declaratio Cleri Gallicani*, l. v. cc. 4, 5. 1 Koch, 230.

(m) A temporary act of union of the Roman and Greek Churches appears to have been signed at Florence, A. D. 1439, but it was speedily dissolved.—Ib. 231.

(n) The Councils of Constance and Basle were called Reformatory, and modern writers, who are vehement upholders of the Papal pretensions, admit that the views of the Popes, and especially the flagrant abuse of spiritual censures, called aloud for reformation.—Phillipps, *Kirchenrecht*, iii. p. 325.

had begun; the very meaning of the latter term, it must be observed, bears testimony too the historical facts stated above; we learn from it that the relation subsisting between the spiritual chief at Rome and the Government of other nations, had become that of an alliance regulated by treaty between two independent States. Nevertheless, there is this distinction to be borne in mind, viz., that a third party, the National Church, and especially the Clergy, are parties interested (indeed, principally interested,) as well as the Government and the Roman See, in whose names a treaty is contracted.(o)

The *Concordata* between the Roman See and Independent States proceed upon two presumptions:—

First,—That there are certain rights and privileges inherent in Sovereigns with respect to the Church established in their realms.

Secondly,—That there is in independent kingdoms, whatever relations it may bear to Rome as the centre of unity, a national Church—the two principles which the Pragmatic Sanctions had already on the part of the nation declared to be essential to the independence of the State.

CCCXXV. The International relations of Rome with other [*338] nations cannot be understood without an examination of these instruments;(p) from them not only the expression of Pontifical and National will may be best collected, but usage, the great expounder of International Law may be most clearly ascertained.

As the era of the Reformation, and the Treaty of Vienna (1815,) have greatly affected this branch of the Law, it will be convenient to divide the consideration of this subject into three epochs:—

1. The period preceding the Reformation.
2. The period intervening between it and the Treaty of Vienna.
3. The period subsequent to this Treaty.

CCCXXVI. 1. As to the period before the Reformation. The history of the intercourse of the secular Government and of the national Church of France with the Pope, is perhaps that which best illustrates the International Relations between Independent States and Rome during this period. Into this discussion the most remarkable circumstances of these peculiar relations in the history of other nations, during the same period, may be easily interwoven; though, as to the period which has elapsed since the Reformation, they will require a separate and more specific narration.

CCCXXVII. A Pragmatic(q) is an imperial constitution, framed,

(o) De Pradt, i. 280.

(p) Eichhorn follows Sauter in pronouncing his opinion that inasmuch as all concordata are founded upon the principle of the weal of the Church, they are only binding so long as they attain that end, and cannot therefore be ranked either among private or international contracts.—Eichhorn, *Kirchenrecht*, I., B. iii. Absch. i. c. 5, pp. 578–9. Sauter, *Fundam. Jur. Eccl. Cathol.* p. 1, ss. 626–4.

(q) “*Pragmatica s. Pragmaticum, rescriptum principis solemne præsertim illud quod res publicas administrandas aut negotia collegii alicujus tractanda respiciebat.*”—Dirksen, *Manuale Lat. Fontium Jur. Civ. Romanorum*.

“Parmi nous l’usage a donné ce nom aux grandes ordonnances qui concernent les grandes affaires de l’Eglise, ou de l’Etat, ou, au moins, les affaires de quelques communes.”—Durande De Maillane, *Dict. du Jur. Can., voce PRAGMATIQUE SANCTION*. Ducange, *Gloss., voce PRAGMA*. *Πράγμα* is, of course, its origin.

[*339] after inquiry and deliberation, upon a matter of *State importance, with the consent of the chiefs and the approbation of the Sovereign of the country(*r*).

The Pragmatic, which is of the earliest International importance with reference to the present branch of our subject, is that of Saint Louis. It was promulgated in 1268, by that Monarch of France, whom the Church of Rome has especially delighted to honour. It is extremely simple, short, and pertinent, and a most valuable historical monument upon this branch of International Law.

CCCXXVIII. "Ludovicus, Dei Gratiâ Francorum Rex, ad perpetuam rei memoriam. Pro salubri et tranquillo statu Ecclesiæ regni nostri, necnon pro divini cultûs augmento, et Christi fidelium animarum salute, utque gratiam et auxilium omnipotentis Dei (cujus solius ditioni ac protectioni regnum nostrum semper subjectum extitit, et nunc esse volumus,) consequi valeamus, quæ sequuntur hoc dicto consultissimo, in perpetuum valituro, statuimus et ordinamus.

"I. Prim out Ecclesiarum regni nostri prælati, patroni, et beneficiorum collatores ordinarii jus suum plenarium habeant, et unicuique sua juri-dictio servetur.

"II. Item, Ecclesiæ cathedrales, et aliæ regni nostri liberas electiones, et earum effectum integraliter habeant.

"III. Item simoniæ crimen pestiferum Ecclesiam labefactans a regno nostro penitus eliminandum volumus et jubemus.

"IV. Item promotiones, collationes, provisiones et dispositiones præ-laturarum, dignitatum, et aliorum quorumque beneficiorum et officiorum ecclesiasticorum regni nostri, secundum dispositionem, ordinationem, et determinationem Juris Communis, sacrorum Conciliorum Ecclesiæ Dei, [*340] atque *institutorum antiquorum sanctorum patrum fieri volumus et ordinamus.

"V. Item exactiones et onera gravissima pecuniarum per *curiam Romanam* Ecclesiæ regni nostri imposita, quibus regnum nostrum miserabiliter depauperatum extitit, sive etiam imponendas, vel imponenda, levare aut colligi nullatenus volumus, nisi duntaxat pro rationabili, piâ et urgentissimâ causâ, vel inevitabili necessitate, ac de spontaneo et expresso consensu nostro et ipsius Ecclesiæ regni nostri.

"VI. Item libertates, franchisias, immunitates, prærogativas, jura et privilegia per inclytæ recordationis Francorum reges prædecessores nostros, et successivè per nos, Ecclesiis, monasteriis, atque locis piis religiosis, nec non personis ecclesiasticis regni nostri concessas et concessa laudamus, approbamus et confirmamus per præsentem.

"Datum Parisiis, anno Domini 1258, mense Martio."(*s*)

Here, then, we have a French King and a French Church, with rights and privileges which have been grievously injured, and which are to be for the future protected against the invasion of the *Curia Romana*. These articles are the *Magna Charta* of the liberties of the Gallican Church,

(*r*) The Roman Emperors published Pragmatic Rescripts in the time of St. Augustine, as did the first and second races of French monarchs.—De Pradt, i. 198.

(*s*) Lequeux, *Manuale Compendium Juris Canonici*, t. iv. pp. 432–3.

Bossuet said that in them were contained the celebrated four propositions, which will presently be mentioned.

CCCXXIX. The next national declaration of importance, on behalf of the State and Church of France, was made after the close of the great Schism of the Western Church, and after the Council of Constance and Basle had endeavoured to apply remedies to the frightful disasters of the Ecclesiastical State. The two Estates were assembled at Bourges by Charles VII., and unanimously accepted, with certain modifications, the decrees of the Council of Basle.^(t) The resolutions of the French Council were made by royal ordonnance *part of the law of the nation, and duly registered in the Parliament, 13th July, 1439. [*341] Pope Eugenius protested against them in vain. Pius II. renewed the complaint after the death of Charles VII. (1461.) Louis XI. yielded to his urgent solicitations, and issued Letters-Patent for its abolition; but the Parliament refused to register them, and made one of those celebrated remonstrances, which will always keep their place in the history of France.

Paul II. pressed Louis XI. for stronger measures. The University of Paris declared to the Legate that it would appeal to a future Council against any invasion of the Pragmatic. Louis, however,^(u) was bent upon making peace with the Pope, and made a Treaty, in 1724, with Sextus IV., which reduced the Pragmatic, as to beneficiary matters, to the same position as the German *Concordata*. But the Parliament refused to register the Treaty.

Louis XI. died in 1483; his successor, Charles VIII., plunged into Italian wars and politics, and was little disposed to aid the Pope. This Monarch assembled the three Estates at Tours. Innocent VIII. and Alexander VI. attacked Charles in vain, and after his death (1497), they found in Louis XII. a yet more obstinate adversary. Julius II. put France under an interdict, and excommunicated the King; but Louis XII., fortified by the universal sympathy of his subjects and the alliance of the Emperor Maximilian, ordained that the Pragmatic of Bourges should be observed throughout France, and convened, in 1499, his clergy at Tours. Before this assembly he laid the dispute between himself and the Pope, and sought their advice upon certain questions^(x) proposed to them. The French clergy agreed that their King had full power to protect his subjects from all oppression, that it was lawful for him to deprive the Pope of fortified places *used as means of annoyance to his neighbours, to withhold obedience, so far as [*342] was necessary to his safety, from the Pope, and during the interval of suspended obedience to conform to the ancient discipline of the Church. That what he did for himself he might also do on behalf of his allies; that the Papal excommunications issued upon temporal matters, and without legal form, were altogether null. The chief of the clergy requested permission to lay these resolutions before the Pope, and to call

(t) Durande de Maillane, ubi supra. De Pradt, i. c. ix.

(u) See De Pradt, i. p. 232, &c., for the motives of Louis: among them was the hope of obtaining Naples.

(x) They appear to have been eight in number.

upon him to put an end to a scandalous war, and convene a general Council. And they besought the King, if the Pope should fail to heed their request, to join with the Emperor and those cardinals and foreign ecclesiastical dignitaries who stood aloof from Rome, to adopt the precedents of Pisa, Basle, and Constance, and convene a general Council without the Pope. Finally, they determined to meet again at Lyons, and await the reply of the Roman See, and in the meanwhile they forbade all communication with Rome, especially in the shape of pecuniary contributions. Maximilian promised the hearty concurrence of himself and his clergy at the forthcoming Council of Lyons.(y)

CCCXXX. In the midst of these significant preparations, Louis XII. died. In the year 1514, France had a new Sovereign, and, the fruit of his exigencies, a new Ecclesiastical Law.

Francis I. found himself in a very embarrassing position.(z) Eager for Italian conquests, he had already vanquished some of his opponents, when he received at Pavia the intelligence that Leo X. (1516) had issued a peremptory citation against the Crown, the Church, the Parliament, and the Universities of France, to show cause why the Pragmatic should not be abolished. Its condemnation was certain before the trial. [*343] *Rash, ill-judging, ill-advised, scared by the probable consequences of an excommunication and interdict by Pope and Council, and by the league of enemies stirred up against him by the Pope, Francis repaired to Bologna, and there, with the manner and in the language of humiliation, signed a Concordat with Leo, abrogating the Pragmatic (1516,) and undertook to procure its registration in Parliament.(a) Long and sturdily did the Parliament refuse to register a Treaty, which they openly and courageously avowed to be contrary to the liberties of the kingdom and the Church.(b)

The Crown had entreated, the Chancellor addressed them in vain, when the Grand Chamberlain, De la Tremouille, spoke to them(c) in a style which overcame the obstacle; he assured them, *inter alia*, that the honour of the Crown was at stake, and added the most violent threats of compulsory registration of the Concordat. The Parliament finally having rejected the Papal Bulls against the Pragmatic, registered the Concordat, protesting against the violence used against them, and appealing to a better-advised Pope and a future General Council.

(y) Maximilian, it should seem, like one of his predecessors, had some idea of making himself Pope, and the Papacy hereditary.—1 De Pradt, 238-9, n.

(z) Observations sur le Concordat fait entre Léon X. et François Premier, par M. Michel du Peray. Paris: 1740.

(a) "Tempori utique inserviendum esse duximus, ac rebus nostris periclitantibus pro re nata consulendum imminentiæque detrimenta minore ac leviore dispendio dirimenda obnixis precibus ab eo (Leoni X.) contendimus ut si Pragmaticæ nomen omnino esset abrogandum, saltem vice illius bonâ suâ concillique veniâ certos nobis leges conditionesque meditari comminisque liceret quibus Imperium nostrum supradictum in posterum uteretur quod ad ea quidem pertinet quæ sanctione Pragmaticâ cavebantur."—D. De Maillane, t. i. p. 781, App.

(b) "Relation de ce qui passa sur la publication et l'enregistrement du Concordat au Parlement de Paris des années 1516 et 1517, contenant les raisons du Parlement pour empêcher cette publication et ces protestations à ce sujet."—1 De Pradt, 250.

(c) 1 De Pradt, 264-5.

The University of Paris made a similar appeal, and the King was besought by the *Doyen de l'Eglise de Paris*, in the name of the Chapter, to assemble the French Church. The execution of the Concordat, the object of universal disgust, *and condemned by the nation and the Church, became a matter of extreme difficulty. (d) The [*344] Pope granted its prorogation, (e) first for six months, then for a year, then for another year. Francis was taken prisoner at Pavia in 1524; the consternation ensuing on this calamity was favourable to the Concordat. The King referred the cognizance of contested elections, as to the consistorial or more important benefices, to the Council of State.

Henry II. confirmed this decree in 1552, and thus a great obstacle was removed from the path of the Concordat.

In 1560, Francis II. sent an edict to Parliament, referring causes of religion to Ecclesiastical Judges. Parliament took an opportunity of addressing the King to restore the liberty of Elections and the Pragmatic, (f) essential, they said, to the welfare of his subjects. In the same year the successor of Francis, Charles IX., received remonstrances from the States at Orleans.

CCCXXXI. The earliest Concordat of the German Empire with the See of Rome was the *Concordatum Calixtinum*, betwixt Henry V. and Pope Calixtus II., A. D. 1122. (g)

Its historical and legal importance is but slight; it contained *the arrangement respecting investitures which has been already [*345] mentioned.

The Concordata of the fifteenth century were in great measure founded upon the Basle decrees, which were once formally accepted by a decree of the Empire at Mayence, in A. D. 1439, (h) and the firm attitude of the

(d) "Ad Papam melius consultum et futurum Concilium Generale legitimè congregandum et ad illum vel illos ad quem seu quos petendo Apostolos instantissimè," &c.—Durand De Maillane, voce PRAGMATIQUE SANCTION.

(e) See what the French call the "*disposition ampliative*," which they distinguish from the *Concordat* itself, though it begins tit. xvii. :—

T. xx. is "De prorogatione temporis ad recipiendum," &c.

1. "Ad postulationem Regis" (six months).

2. "Eo quod propter varias occupationes non fuit Concordatum approbatum et receptum a regnicolis" (one year).

3. "Conceditur secundus annus a fine primâ computandus ad hoc ut Concordata recipiantur et observentur a regnicolis."

—D. De Maillane, voce CONCORDAT.

(f) "Ce règlement toujours cher aux Français," says D. De Maillane, voce CONCORDAT, t. i. p. 621; but which Leo X. calls, in his condemnatory Bull (19th Dec. 1516), "*Regni Franciæ corruptelam Bituricensem*."

(g) Eichhorn, Kirchenrecht, I., B. ii. Absch. ii. cap. 1. iv. Die Concordata.

(h) Sanctio Pragmatica Germanorum illustrata (confirmatory of, and suppletory to, Decrees of Basle and Mayence, accepted in Germany,) Koch, c. 9, (ed. Argentorati, 1789,) consists of three parts :—

1. Historia Sanctionis Pragmaticæ.

2. Argumentum S. P. This part includes—

VII. De Cardinalibus Eccles. Rom.

II. Power of General Councils.

P. 61, c. ii. 1. Jura Pontifici ablata, Reservationes generales et speciales, Gratia expectata.

3. Sylloge Documentorum quibus Sanctio Pragmatica Germanorum illustratur.

P. 201. Tabulæ Concordatorum inter Nicolaum V. Pont. et Fredericum III.

Imp. (Vindobonæ initorum, A. D. 1448, 17th February.)

Electoral Princes extorted a ratification of this act from Eugenius IV. But in 1448 the Emperor Frederic III. entered at Vienna into a separate Concordat with Nicholas V., whereby a large part of the claims sacrificed by his predecessor were regained by him for the Roman See. It would appear, however, from the reply of Æneas Sylvius⁽ⁱ⁾ to the "*Murmur gravaminis Germanicæ Nationis*,"^(k) in A. D. 1457, that, on account of [*346] the difficulties *and troubles of the time in 1449, a compromise only between these Basle decrees and the Papal claims had been allowed by the Roman See, for he had rejected the notion that an absolute Sovereign like the Pope could make a Treaty with his subjects.

In 1487, however, the entire Empire successfully resisted a tithe which the Pope sought to impose; and in A. D. 1500, the Empire granted the Pope only one-third of that indulgence, and reserved the two other parts for the war against the Turks. Nevertheless, the detestable Alexander VI. and his successor Julius II., raised the Papal power to a height which enabled them to speak, at the beginning of the sixteenth century, the language held by Boniface VIII. at the beginning of the fourteenth.

The accomplished and dexterous Leo X. found little difficulty in emasculating the Decrees of Basle and Constance, by a Council held at Rome (A. D. 1512-17,) and at last it appeared that all the advantage that the Reforming Councils had bestowed upon States and National Churches had shrunk into a few limitations upon the arbitrary application of the Reserved Privileges of the Papal See.^(l)

The consequence of this retrogression in Ecclesiastical Reform, was that portentous event in the history of the world, usually called the Reformation.

The abuses and exactions^(m) of the Court of Rome, and the gross wickedness of some of her Pontiffs had heaped up that smouldering mass [*347] of disgust and discontent throughout *Christendom, which, about the year 1517, the preaching of Martin Luther and Ulric Zwingle against the Indulgences of Leo X., kindled into a flame.

The way of General Councils had been tried, and had failed, and the National Churches appeared to have struggled in vain for their liberty.

Præf. 2. "*Palladium hoc Ecclesiæ Germaniæ et sacram quam libertatis ancoram.*"

The Bulls of Ratification, issued 5th and 7th February, 1447, were called in honour of the Princes, "*Die Fürsten-Concordate.*"—Eichhorn, B. i. Abchen. i. c. v.

(i) He was then Cardinal: he became Pius II. A. D. 1451.

(k) "*Æneæ Sylvii Epistola ad Martinum Maierum contra Murmur gravaminis Germanicæ Nationis*, A. D. 1457," cited by Ranke, c. i., from Müller's *Reichstags-theatorum* unter Friedrich III., p. 60. Mayer was Chancellor to the Archbishopric of Mayence. Schröckh, xxxii. Theil. 172-215, contains a full account of the whole negotiation and of the long correspondences between the Chancellor and Cardinal; the former defending the liberties of the German Church, the latter maintaining, in language at least, the loftiest pretensions of the Pope.

(l) Schröckh, xxxii. p. 519.

(m) Freely admitted by many modern Roman Catholic jurists and canonists. Phillpotts, iii. 325. "*Es lässt sich nicht leugnen, dass eine nicht geringe Zahl von Papsten sowohl durch ihre Sittenlosigkeit als auch durch den vielfachen Missbrauch ihrer Gewalt, namentlich im Betreff der Geistlichen Strafen, selbst einen grossen Theil der Schuld an jenem traurigen Zustande der gesammten Christenheit auf sich geladen hatte.*" See, too, p. 335, "*Die völlige Sorglosigkeit der Päpste.*"

*CHAPTER VI.

[*348]

THE PERIOD OF THE COUNCIL OF TRENT, AND ITS EFFECT UPON INTERNATIONAL RELATIONS.

CCCXXXII. THE Council of Trent,^(a) which has so materially affected the status of the Roman Catholic clergy, and in some degree the laity,^(b) has too much of an international character to be passed by without some notice. The rapid increase of Luther's disciples, the many and admitted abuses of Rome, and the urgency of the Emperor Charles V., compelled Paul III. to convene this assembly.

It began in 1545 and ended in 1563. During these eighteen years it had many intervals and interruptions, and three distinct epochs.

The first under Paul III., 1545-1547.

The second under Julius III., 1551-1552.

The third under Pius IV., 1560-1563.

The important questions mooted during its sessions gave rise to frequent debates of the most vehement character; they *were decided, not as those at the Council of Constance had been, by ^[*349] the majority of the suffrages of nations, but by the majority of individual votes, as at the Council of Lateran,—a proceeding which impressed an Italian rather than an international character on the conclusions of the Council, as the whole number of votes was 281, out of which 189 were Italians.

The English Church was not represented at this Council.^(c)

The representatives of the Spanish and the French Churches maintained, with great fervour, the Divine Right of Episcopacy, as emanating immediately from our blessed Lord, and not immediately from the Pope,^(d) meaning that the fact that a Bishop was made and confirmed by the Pope, was no more an argument against his deriving his authority from our Lord, than the fact that the Cardinals elected the Pope was an argument that his power was derived only from them. These Churches, moreover, maintained the superior authority of the Church generally to the authority of the Pope, and appealed to the Councils of Basle and Constance, which the Italians rejected.

(a) Eichhorn, *Kirchenrecht*, I., B. i. Abschn. iii. c. 1; Durande De Maillane, "*Trente*," "*Libertés de l'Eglise Gallicane*;" Lequex, *Manuale Compendium Juris Canon.* iv. 171-348 (Paris, 1850;) Landon's *Manual of Councils*, "*Trente*," are works of easy access.

The great works of Thuanus (De Thou,) and those of Sarpi and Pallavicini the rival historians of the Council, are well known. There is a careful criticism upon their respective merits in the Appendix to the last volume of Ranke's *History of the Popes*. See, too, Giesler, *Lehrbuch der Kirchengeschichte*, Abschn. iv. c. i. s. 105. "*Wirkungen der Schisma auf die allgemeine Kirchliche Meynung*."

(b) E. g. as to the Law of Marriage, see Dalrymple v. Dalrymple, *Judgment of*, Lord Stowell, 2 Consistory Reports, 64. Swift v. Kelley, 3 Knapp's Privy Council Reports, 283.

(c) There appears, by the lists, to have been one English Bishop.

(d) It was finally resolved to omit all notice of the institution of Bishops and of the authority of the Pope.

The French Ambassador loudly demanded that the decisions of the Pope should be submitted to the Council, that the reforms of the Church in its Head and members, as had been promised at Basle and Constance, should be effected; and of these reforms the abolition of *annates*, and arrangements made for avoiding the necessity of sending for dispensations to Rome, were among the most necessary.

The King of France expressed his extreme dissatisfaction at the scanty measures of reform proposed, and many of the French bishops, and one of the ambassadors, withdrew from the Council: the latter having previously protested against certain propositions as contrary to the Rights of the Crown and the liberties of the Gallican Church.^(e)

[*350] *The Tridentine Council closed 4th December, 1563; it was confirmed by a Bull of Pius IV., 26th June, 1564. A perpetual Congregation of Cardinals^(f) was instituted to advise the Pope as to the interpretation of its decrees, all commentaries on which were forbidden. Canonists^(g) hold that the Pope may dispense tacitly, and without express declarations, with decrees of this council, though he cannot, without express declaration, derogate from those of other councils. They found this opinion upon the words (Decr. 21, Sess. 25:) "Ut in his salva semper autoritas sedis Apostolicæ sit et esse intelligitur."

CCCXXXIII. The Decrees of the Council were arranged under two principal divisions or heads:—(1.) The Decrees concerning the Discipline (*de Reformatione*,) and (2,) those concerning the Faith set forth in Canons (*canones*,) which closed with an anathema upon all who held a different opinion. These Decrees depended course, for their civil and legal validity beyond the Roman See, upon their reception by the authorities of other countries.

The French Kings at first solemnly protested against it, as a private assembly of certain prelates, who had insulted the ambassadors and attacked the liberties of the throne and Church of France.

The clergy of France were generally well affected to it, and often, but in vain, besought its legal promulgation.^(h) This promulgation was made by the Pope one of the conditions of Henry IV.'s reconciliation with Rome; but in vain did this popular monarch entreat the Parliament to consent to its publication, even with a general clause of reservation for the liberties of the Gallican Church. He was obliged to accept the answer of the illustrious De Thou,⁽ⁱ⁾ that the *Parliament knew
[*351] no precedent since the foundation of the monarchy for receiving a Council, without examining and reconsidering every article that it contained.

The Ordonnance of Blois (1579,) however, incorporated into its text large portions of the Council of Trent, carefully avoiding to mention the source from whence they came.

Generally speaking, it may be said, that by edicts, ordonnances, and

(e) See, as to the Pope's power of excommunicating Kings, s. 22, c. 4, De Ref.

(f) "*Trente*," D. De Maillane, iii. 667.

(g) Ibid.

(h) De Concordantiâ Sacrodotii et Imperii sui de Libertatibus Ecclesiæ Gallicanæ, Petrus de Marca, Archiepiscopus Parisiensis (died 1662,) l. vii. c. 28, 3.

(i) Thuanus, l. vii. Memoirs preceding his History.

usage, the principal decrees of the Council, as to matters of faith and discipline, (*k*) have practically, though not formally, been introduced into France.

With respect to other European countries, the Tridentine Council was generally received by them.

It was rejected by the Catholic and Episcopalian Churches of Greece, Russia, Egypt, England and Scotland, and, of course, by the Protestant and Non-Episcopalian Churches of Germany and the North, and by the civil Governments of all these countries.

CCCXXXIV. The religious wars which broke out at the beginning of the sixteenth century, and were extinguished by the Treaty of Westphalia must be mentioned in connexion with this subject of the Papal relations with independent kingdoms. Disgust at the practical abrogation of the Reforming Councils of Basle and Constance, determined large bodies of religious persons to break off all connexion with the Roman See. Not merely the relation flowing from the acknowledgment of the Pope as the visible Head of the Church upon earth, but the lesser and more reasonable relation flowing from the acknowledgement due by comity, and a regard to ecclesiastical order, to the Patriarch of Western Christendom, were, in the hour of indignation and despair, forcibly snapped asunder by the Protestants of Switzerland, France, and Germany. The Germans protested in 1529 against the Decrees of the Diet of Spire, which forbade any change in religious matters until a General Council could be holden. They subsequently refused to submit to the decrees of a Council held in Italy, *which they thought, not without reason, would be in fact the voice of the Italian, rather than the Universal Church. [*352] They presented their confession of faith at the Diet of Augsburg, 1530.

The profound treachery and great ability of the Elector Maurice united the Protestant Princes of the empire (*l*) against Charles V. In 1552, the Treaty of Passau was made, and in 1555 the Diet of Augsburg was held, by which the liberty of exercising a religion unconnected with the Pope became part of the law regulating the mutual relations of Independent States; though thirty years of a desolating warfare, which cannot, even now, be read without a shudder, were to be endured by Germany and Holland, before this principle was firmly incorporated into the Public Law of Europe by the memorable Treaty of Westphalia, signed at Munster and at Osnabruck in 1648. (*m*)

During this corrupt period, the minds of men upon all questions of civil and religious liberty were much affected by the circumstances and character of their time. Private ambition and avarice often wore successfully the mask of religious zeal. True ideas of liberty and religion were mixed with specious falsehoods, which sprung from pride of intellect and licentious passion. The consequences, as the subsequent pages of history are unfolded, may be traced in bloody characters in the crimes which stained the religious revolutions of many countries, and in the controversies which still agitate the world.

(*k*) Lequeux, iv. 394.

(*l*) He concluded, at the same time, a secret treaty with Henry II. of France.

(*m*) De Pactis et Privilegiis circa Religionem. Moser. (Franckfort, 1738, ss. 19, 20, 29.) Savigny, R. R. ii.

CCCXXXV. A new era of International Law opens from the date of this Treaty, and especially with respect to the immediate subject of these chapters.

The Treaty was signed—not an insignificant fact—without the intervention or ratification of the Pope, who protested in *vain against [*353] those articles of it which confirmed the secularisation of ecclesiastical property, as his successor was destined to do upon the same ground and with the same effect, against the last Treaty of Vienna.

The relations of the nations of the whole earth—for Christianity had passed the limits of Europe, and planted itself in a new world—were now both greatly and permanently changed towards Rome. Her claims in theory were the same. The Pope was still the Vicar of Christ upon Earth, the sole fountain of the Episcopate, the infallible Judge of all matters appertaining to religion; and if the logical consequences of supreme temporal as well as spiritual power were not put forward, they were not abandoned, and, indeed, had been remarkably exercised, at no very distant period, in dividing the newly-discovered regions of the world between the two independent States of Spain and Portugal, and were, as will be seen, as late as the year 1773, asserted in all their plenitude.

But the actual state of the world as confronted with these claims* was this:—An Episcopal Church in Great Britain, deriving its Catholic doctrine and order from the early Fathers and Councils of the Undivided Church.

A Church in France, which claimed as resolutely as that in Great Britain the Divine Right of the independent Episcopate, and denied the power of the Pope to dispense with the customs of the national, or the canons of the visible General Church, though it acknowledged the Headship and the Patriarchate of the Successor of St. Peter.

Protestant Churches in Germany repudiating Papacy, and, as connected with it Episcopacy.

The Churches under the Patriarchate of Constantinople, who charged Rome with being the original and continuing cause of the Schism of Christendom; and under this Patriarchate should be included, at this time, the Churches of Russia, Syria, and Egypt.

But in all these countries there were Roman Catholic as well as Catholic and Protestant subjects. How was the relation between the Roman Catholics and the Pope to be carried on *when the religion of [*354] the State was Protestant or Catholic, but unconnected with Rome?—how were Protestant subjects to be treated in Roman Catholic, and Roman Catholic subjects in Protestant countries? This is perhaps the most difficult of State problems, and has never yet been satisfactorily solved.

The Reformation, and the spirit, which arose with it, of searching inquiry into the legitimacy and foundation of all claims, naturally affected the relations of Governments as well as of Churches with the See of Rome.

Before we consider these relations in the case of individual States, let us glance at their general features in all States during the period between the Treaty of Westphalia, and the last Treaty of Vienna.

The Council of Trent was not able to extinguish the general desire—of which the decrees of the Councils of Basle and Constance had been the expression,—for a National Church, one, if not wholly independent of Rome, yet connected with it only by a recognition of its Patriarchate and Primacy. Cismontane canonists, the Anglicans, and the Protestants, were continually employed in maintaining, that the more the other claims of Rome were considered, the more it became apparent that their origin was to be traced to the false Decretals of Isidore, then and now admitted to be forgeries, and which had been fabricated for the purpose of maiming and weakening the true apostolical rights of each individual Bishop.⁽ⁿ⁾

Many and sore appear to have been the strivings of the Church, in different countries, to return to this primitive state of order and discipline.

The attempt was acceptable to States and governors, because it tended to secure the national independence, and to prevent the allegiance of citizens from being distracted between the claims of a native and a foreign superior.

It was the constant endeavour, therefore, of all Princes and *Parliaments, whether Roman Catholic, Catholic, or Protestant, [*355] to cut off the channels of communication and interference with their subjects, which the Pope kept open.

The reception and authority of Legates and Nuncios, the appeal from Ecclesiastical Courts to Rome, the Annates, the establishment, and protection, and disposition of Religious Orders and Houses, were subjects upon which the governors of States were continually striving to repeal the Papal claims; but there were two questions which, so far as International relations with the Papacy are concerned, almost exclusively occupy the foreground of the historical picture during this epoch, and upon which the struggle was most severe and most important.

1. The terms under which the Institution or Confirmation of Bishops should be obtained from the Pope.

2. The condition of previous knowledge and sanction on the part of the civil Government with respect to all Bulls, Rescripts, or Apostolic Letters, promulgated by Rome within the dominions of the foreign State.

With respect to the first of these questions, it will be seen that, during the epoch which we are discussing, France, Austria, Portugal, and Naples were, once at least, upon the verge of returning to the primitive practice of instituting and confirming Bishops, and of severing, as England had done, their Episcopal National Church from all dependence upon the Pope.

CCCXXXVI. There is one other question(o) connected *with this subject, of a mixed public and International character, the [*356]

(n) "*Falsæ decretales seculo nono illatæ, videntur in hunc scopum fuisse fabricatæ ut judicia Episcoporum redderent magis difficilia.*"—Lequeux, i. 339.

(o) Gerardi Noodt, *Dissertatio Quarta, de Religione ab imperio Jure Gentium libera*, vol. i. p. 641. (ed. Lugd. 1735:) "*Interest, inquis, civitatum quâ formâ, quo ritu, quibus cæremoniis colatur Deus, nempe, ne fiant conventus, quorum initium in rempublicam conjurationes, et adversus leges stupra, adulteria, incestus, cædes, parricidia, falsa testimonia, fraudesve cogitentur. Non est enim religio*

treatment of which has greatly perplexed the Governments of States, and with respect to which their intellectual errors and moral crimes have been of a most grievous kind—namely, the treatment of subjects professing a different religious belief from that established by the State; such errors and crimes as are illustrated in the treatment of the Huguenots in France, and, in a less degree, of the Roman Catholics in Ireland. No idea appears to have been of slower growth than that of real religious toleration. The absence of it led, as we have seen, to the intervention of foreign Governments, on behalf of co-religionists in other States; but it led also to a still more strange result in France, for there the Roman Catholic Government, (p) which would not tolerate religious dissent, concluded a regular Treaty with its own Protestant subjects, and delivered up towns and cities, like Rochelle, as a security that the provisions of the Treaty should be observed,—a most unnatural, fatal, and impossible policy.

The Edict of Nantes (A. D. 1598) and its Revocation (A. D. 1685) are among the most painful and disgraceful, but also the most remarkable and instructive pages of history.

CCCXXXVII. The policy pursued by the Papacy upon this question of religious toleration deserves notice. The Pope, having in vain remonstrated, by his Nuncio, against the *Treaties of Munster and of [357] Osnabruck, (q) put forth a Protest, (r) in the shape of a Bull, in which he represented these Treaties as “infinitely prejudicial to the Catholic religion, to the Divine worship, to the Apostolical See of Rome, to inferior Churches, to the orders of the clergy, as well as to their ecclesiastical jurisdiction, authorities, immunities, franchises, liberties, exemptions, privileges, and rights; inasmuch as, by divers articles of one of these Treaties of Peace, the lands formerly possessed by the clergy in those countries are, amongst others, abandoned for ever to the heretics and their successors: the *free exercise of their heresy is in several places allowed to these heretics, styled of the Confession of Augsburg; land is promised to be assigned to them to build temples, and they are admitted*

qua perniciēs humano generi inducatur—scelus est cui prætexitur color religionis—id cum turbat disciplinam, et strigat finem civilis conjunctionis: non obstat Dei veneratio, cur non perinde ad severitatem legum pertineat, ac si adhibita non esset imago religionis? Sic hominum sacrificia in Africā sustulit Tiberii principatus, sic Bacchanalia Romæ atque in Italia coercuit Senatus, cæterum, innoxia sit Religio nec ad turpe atque improbum deflectat facinus, sed virtutem juvat et bonos mores, sed agat ut salva sit Reipublicæ reverentia quod improbetur? nisi si quis non flagitia sectæ affinia, sed sectam quamquam scelere vacuam puniendam existimat? Sed hoc injusti ac feri et crudelis hominis esse, quis non videt?”

P. 642. “Nam si (secta) perdendæ sit Reipublicæ non quia nova est prohiberi debet sed quia noxia.”

P. 644. Noodt remarks that Valentinian the elder is praised by Ammianus (i. lib. 30, c. 9,) for his toleration; and Noodt also cites Valentinian's Constitution, in the Codex Theodosianus, which ends—“Testes sunt leges a me in exordio imperii mei datæ quibus unicuique quod animo imbibisset, colendi libera facultas tributa est. *Nec Haruspicinam reprehendimus, sed nocenter exerceri vetamus.*” Valentinian was a Christian.

(p) Portalis, ib. Introd. pp. ix.—xix.

(q) Vide ante, vol. i. p. 48.

(r) Parl. P. for 1816, pp. 103–4. L'Histoire du Traité de Westphalie, par le Père Bougeant, t. vii. pp. 412, 414, 423.

along with the Catholics to public functions and offices. . . . Therefore, we, of our own accord, from our certain knowledge, after mature deliberation, and by virtue of the plenitude of the ecclesiastical power, pronounce and declare by these presents that the aforesaid articles . . . have been by right, are, and shall be for ever, null, void, of no value, iniquitous, unjust, condemned, reprobated, frivolous, without any force or effect, and that *no one is bound to observe them, although they should have been confirmed or strengthened by an oath.*(s) . . . Nevertheless, by way of greater precaution, and as far as may be necessary, we, of our own said accord, knowledge, deliberation, plenitude of power, condemn, reprobate, annul, suppress, and deprive of all force and value the aforesaid articles," &c.

*CHAPTER VII.

[*358]

THE INTERNATIONAL RELATIONS OF THE PAPACY WITH FOREIGN STATES
IN WHICH THE ROMAN CATHOLIC CHURCH IS ESTABLISHED, DURING
THE PERIOD BETWEEN THE REFORMATION AND THE PRESENT TIME.—
THE HISTORY OF CONCORDATA.

CCCXXXVIII. THE great evil of the Concordat of Francis I.(a) was the manifest inequality of the contract in one important particular between the contracting parties. It assigned a term within which the Crown must nominate, but no term within which the Pope must institute, the Bishop. In this inequality the ground was prepared for collision between the State and the Pope. The advantage was necessarily and greatly upon the side of the spiritual potentate. Upon the Episcopate the clergy depended for their order, the laity for the enjoyment of religious ministrations, and, indirectly, the whole realm for its tranquility. If the Pope refused institution, the Crown had no means of redress, though its State was thrown into the utmost confusion, and its subjects were deprived of their greatest blessing. The means to which one temporal State resorts against another temporal State, of compelling the execution of the contract, were, or ought to be, wanting in this instance.

France and Naples might, and did indeed, sometimes sanction the invasion of the Papal territories, as of Avignon and Beneventum, and so far treat the Pope in this respect as a temporal Prince, as to have recourse to the means, which International Law would sanction, of compelling a temporal Prince to fulfil his contract.

*To dwell on the mischief done to the Church alone by this consequence of the Concordat(b) of Francis I., does not belong [*359] to this work; but such mischief to the State and Church could never have arisen under that primitive rule of the Church by which the Bishop was elected by the laity or clergy, or both, and instituted by his compro-

(s) Vide ante, pp. 67, 299, in fine.

(b) De Pradt, i. c. 14.

(a) De Pradt, pp. 304-5.

vincials and Metropolitan. "Il est sans doute conforme à l'antique discipline de l'Eglise Gallicane d'attribuer aux Metropolitains et aux plus anciens Evêques des metropoles l'institution des Evêques,"(c) is the language of the "Exposition des Principes sur la Constitution du Clergé par les Evêques députés à l'Assemblée nationale" in 1791,(d) of which Pius VI. approved, and which a modern French council has pronounced, not unjustly, to be one of the fairest monuments of the Gallican Church.

CCCXXXIX. Between the reign of Francis I. and Louis XIII.,(e) on account of the Pope's refusal of a Bull of institution to a Bishop nominated by Henry IV. to the See of Auxerre, that see was vacant for twelve years. Louis XIII. underwent a similar refusal in the person of the celebrated De Marca, whom he had nominated to the Bishopric of Conserans; and the vacancy lasted six years, from 1642 to 1648.

Three Popes(f) successively refused the confirmation of the Bishops of Louis XIV., and the number of vacant sees amounted at one time to thirty-five. In later times the Pope sometimes accomplished the end of refusal in a less direct manner, by leaving out the name of the Prince in the Bull, which, according to the Concordat, ought to be there, and thereby making it appear that the nomination was made *proprio motu* of the Pope, and not of the Sovereign. Such Bulls were of course rejected by the Prince.

CCCXL. To these disagreements, in spite of a *Concordat* [*360] *between the States and the Pope, Christendom is indebted for the ever memorable declaration of the liberties of the Gallican Church.

As early as 1504,(g) the University of Paris protested against certain powers claimed by the Legate d'Amboise, with respect to the collation of benefices, and the rights of graduates, and asserted, with respect to denying the absolute power of the Pope, that "*in hac consistit libertas Ecclesiæ Gallicanæ.*" In 1594, Pierre Pithou,(h) published, under the title of "*Libertés de l'Eglise Gallicane,*" a sort of code of eighty-four articles, deduced from two maxims, namely, the independence of Princes, and the limitation of Papal authority by canons and councils. This code has been called by French writers the *Palladium* of France, and has actually been cited in edicts, as in that of November, A. D. 1719.(i) In 1651 it was published, after De Marca had defended it in his great work, with a "privilege" prefixed by the King, in which the work was represented as placing the *Regalia* of the Crown in ecclesiastical matters beyond dispute.(k)

In A. D. 1614, the States-General complained bitterly of infringements upon their liberties. In 1663, the Sorbonne put forth six arti-

(c) See this exposition at length in Lequeux, i. 499.

(d) Ib. 387.

(e) De Pradt, i. c. 6.

(f) Innocent XI., Alexander VIII., Innocent XII.

(g) Lequeux, i. 358.

(h) The most learned Frenchman of his time; born at Troyes, died 1596, at the age of 57. François Pithou, his brother, shared his labours and fame.

(i) Durande De Maillane, cit. t. iii. 194, contains the eighty-four articles at length.

(k) The most famous commentary on Pithou's work is that of Jacques Dupuis, in two vols. folio. Some of the propositions contained in it were condemned by an assembly of the clergy in 1640.

cles,^(l) denying, in the plainest language, all authority of the Pope, direct or indirect, in temporal matters, declaring that he had no power of dispensing with the obedience of subjects, of deposing Bishops, that he was not infallible, and asserting the inferiority of the Pope to an œcumenical council, and proclaiming that the King had no superior but God.

*In 1673,^(m) Louis XIV. extended, by an edict, his *Regale* over all the dioceses of his kingdom. Two prelates⁽ⁿ⁾ only [*361] resisted this edict; one of whom appealed to Pope Innocent XI., and was protected by him. The Archbishop of Toulouse, nevertheless, proceeded against the Bishop and his Vicars-General. The quarrel between the Crown and the Pope became exacerbated.

The King, under the advice of Le Pellier and Bossuet, appealed to a general assembly^(o) of his clergy; and the result was the famous declaration of the clergy in 1682, sanctioned by thirty-four Bishops, and contained in four articles, pretty much the same in effect as the six articles of the Sorbonne, and recognised by name the authority of the Council of Constance. It was approved by Royal Edict in March, 1682,^(p) and annulled by a Brief from Innocent XI., of April 11, 1682. The Pope arbitrarily, and not upon any alleged canonical or moral defects, refused Bulls of Institution to the Bishops nominated by the Crown. Alexander VI. went a step further than his predecessor, and published, January 20, 1691, the Bull *Inter multiplices*, by which he annulled the resolutions equally with respect to the *Regale*^(q) and the spiritual authority,—a Bull, it may be observed, subsequently confirmed by another, the *Auctorem fidei*, of Pius VI.^(r)

*Meanwhile the question of ambassadorial privileges arose at Rome; the Pope excommunicated, the Ambassador protested.^(s) [*362]

(l) Durande De Maillane, ubi supr. t. iii. 210.

(m) De Pradt, i. 335.

(n) D'Aleth and De Pamiers. The latter published a perspicuous little tract, entitled *Traité de la Régale*. "The Régale," he says, "consists in—

"1. La disposition des revenus de l'Eglise vacante.

"2. La collation de *plein droit* des bénéfices non cures durant la vacance du siège episcopal."—P. 5.

(o) It was at the opening of this meeting that Bossuet published his sermon "Sur l'Unité de l'Eglise."

(p) Which in February, 1810, Napoleon declared by an Imperial Decree, and promulgated as the Law of France.

(q) Lequeux, iv. 372-3.

(r) In 1786, when Scipio Ricci, Bishop of Pistoja and Prato, called a Diocesan Synod, which more than adopted the French articles.—Coppi, *Annali d'Italia*, i. p. 155.

(s) The following dissertations by D'Aguesseau should be noticed:—

"*Mémoires Historiques sur les Affaires de l'Eglise de France, depuis 1697 jusqu'au 1710, ou Récit de ce que M. le Chancelier d'Aguesseau a fait en faveur des Maximes du Royaume, des Libertés d'Eglise Gallicane, et de notre Droit Public Ecclésiastique, dans la dispute du Quiétisme en 1697; dans les affaires du Bref de 1703 contre le fameux cas de conscience, de la Bulle 'vineam Domini Sabaoth' de 1705; de M. l'Evêque de Saint-Pons, et de la Déclaration des douze Evêques en 1610 au sujet de l'Assemblée du Clergé de 1705.*"—Tom. xiii. p. 161.

"Fragment d'une 1^{re} Instruction, qui n'a pas été achevée.—Sur l'étude du Droit Ecclésiastique.—Notions générales sur la manière d'étudier le Droit Ecclésiastique." *Ib.*, tom. i. p. 415.

The Nuncio at Paris was put under restraint; Avignon was seized upon; (t) thirty-five Bishops were refused Bulls; the Advocate-General of the Parliament of Paris spoke of the convocation of a council, and of a return to the Pragmatic of providing for their own Church without the Pope.

CCCXLI. The Bishops were on the point of rejecting altogether the Papal authority, when Louis XIV., aided by Bossuet, prevented this catastrophe. (u)

Peace was made in 1793 with Innocent III. Certain Bishops were induced to write a penitential letter to the Pope, and Louis XIV. promised him by letter that the Edict of 1682 should *not* be executed, though it was not to be recalled. *For in 1713, when Clement [*363] XI. called upon Louis to forbid the teaching of the four articles, that monarch wrote a letter to say he had engaged not to enforce the execution of the Edict of 1682, but that it would be unjust to forbid the articles being taught. The Pope was satisfied, and issued the Bulls. The letter was kept as a trophy of the submission of the Gallican Church, brought to Paris by Pius VII. in 1801, and soon afterwards, it is said, burnt by Napoleon. (x)

CCCXLII. The revocation of the Edict of Nantes, the theological quarrels between Jesuits and Jansenists, and the miserable discords arising out of the Bull *Unigenitus*, closed, in sorrow and disgrace, the seventy-two years' reign of Louis XIV. in 1715; but it should be mentioned that, in the year 1695, an Ecclesiastical Edict—in imitation of those precursors of modern codes, the Civil Edicts of 1665 and 1670—incorporated into a sort of code, without reference to Rome, a recapitulation and readjustment of a great variety of previous domestic legislation upon the Gallican Church, especially of the mutual duties and relations of it and the civil power.

CCCXLIII. In 1716, (y) Clement XI. at first refused Bulls of confirmation on grounds connected with the *Unigenitus* Bull, to the Bishops of Bayeux, Tours, and Rhodes, but yielded at last to the positive demands of the Regent.

In 1723, when the infamous Dubois was installed in the chair of the President of the Assembly of the Clergy, he proclaimed his intention of

"XXVI. Plaidoyer. Du 7 Aoust, 1693.—Dans la Cause de Frère Houdiart, Cordelier, qui s'étoit fait transférer dans l'ordre de S. Benoît et de Charles du Sault.

"1°. Si un Bref du Pape portant confirmation d'une translation d'un Religieux, déclarée abusive par un Arrêt, est abusif?

"2°. Si ce Bref et des Lettres-Patentes obtenues du Roi pour en ordonner l'exécution, peuvent avoir effet au prejudice d'un tiers?—Ib. tom. ii. p. 597.

(t) As it had been in 1663, when the Ambassador was insulted at Rome. Satisfaction was demanded and obtained, and an obelisk erected at Rome, with an inscription recording the fact.

(u) "Dies war der Augenblick, wo jene Bischöfe auf dem Punkte, standen, das Schisma auch formell auszusprechen; der Entwurf der Declaration war ganz in diesem Sinne von dem Bischof von Tournay gefasst. Dass es nicht dazu kam, war das Werk Ludwigs und des grossen Bossuet."—Phillipps, Kirchenrecht, iii. 358.

(x) "On ne viendra plus nous troubler avec ces cendres," Napoleon is reported to have said when he burnt it.—De Pradt, i. 353-4.

(y) De Pradt, i. 366. This was at the time when no opposition was made to the conferring of the Cardinal's hat upon Dubois.

acting the part of an Ultramontane Cardinal.(z) But death interrupted his design of covering his many vices with the mantle of disloyal bigotry.

In 1762, the Order of the Jesuits, the great champions of the Papal power, was suppressed by a decree of Parliament of Paris.

CCCXLIV. In 1766, Louis XV. put forth a decree—in [*364] *which he referred to the Edicts of 1682, 1695, and a decree of his Council in 1781, as containing the undoubted Law of France—that though the Church, having a real authority from God, was subordinate to no other in spiritual matters, the temporal power, “which emanates from God, is held from God alone, and is neither directly nor indirectly dependant on any other power on earth;” that though the Church has exclusive power to pronounce upon questions of doctrine, yet the State, before it assisted in their execution, had a right to examine their form, to see that they are agreeable to the constitution of the kingdom, whether they will affect public tranquillity, as well as to prevent qualifications unauthorized by the Church being attached to their publication; that it was the duty of the temporal power to watch over the honour of citizens, and to see that it was not violated by the non-observance of ancient rules and formalities, with respect to which the Sovereign was to be considered as the external Bishop and avenger; that he had a right to declare invalid vows which are not in conformity with civil or canonical rules, and to reject and exclude religious orders which are injurious to the State; and, therefore, that in order to preserve the just boundaries between the temporal and spiritual powers, it was ordered that all the Royal Edicts, and especially the Edicts of 1682 and 1695, should be executed throughout the kingdom, and that the four resolutions of the assembled Bishops of the kingdom in 1682 should be inviolably observed, supported by all universities, and taught in all seminaries throughout the kingdom.(a)

*CCCXLV. In 1768, the Duke of Parma made an edict upon a variety of subjects of a mixed, civil and spiritual character, [*365] and, among other matters, forbad, without his permission, appeals to Rome from litigations as to the benefices of the Dutchy; he forbad also commissions to be conferred on strangers, and ordered that “no writing coming from Rome, *“or other foreign country,”* should have any effect in Parma without the Sovereign’s exequatur. Clement XIII. published a Brief (*monitorio di Parma*) calling the Duchy his own (*nostro ducato di Parma*), declaring the edict void, forbidding all ecclesiastics to obey it, and pronouncing that all concerned in the publication had incurred

(z) Histoire de France, par H. Martin, tom. xvii. p. 293, ed. 1851.

(a) See Appendix to Report from Committee on Regulation of Roman Catholics in Foreign Countries, ordered by the House of Commons to be printed in 1816–1817, and to be reprinted in 1852. In this publication, but still more in the Correspondence respecting the Relations existing between Foreign Governments and the Court of Rome, printed by Parliament in 1851, is contained a vast mine of information. No work exists which gives the modern history of these relations with a fullness of detail at all comparable to this latter publication, and the authority furnished by the minister of each country is indisputable.

the censures of the Bull *In Cœnâ Domini*, and could not be absolved except by the Pope or his successors.(b)

Du Tillot, the Minister of Parma, appealed to the Courts of Europe against this act, and not in vain; for the reference to the Bull *In Cœnâ Domini* had exasperated all the Sovereigns, and the Bourbons were also especially offended by the aggression on their kinsman. Portugal condemned the Brief. The King of Spain put out an edict that the Bull *In Cœnâ* had never been received in his dominions. The Parliament of Paris reprobated the Brief,(c) and observed that all countries rejected the *In Cœnâ* Bull, attacked violently the continual reappearance of obsolete and illegal pretensions of Rome and expressed indignation at the censure on the exequatur, "*which is the law of all countries, and particularly of France,*" and requested that the law, contained in the 77th article "of our liberties," should be enforced, viz, "that all Bulls and despatches coming from the Court of Rome, without exception, are to be examined, to ascertain whether they do not contain any [366] thing that in any manner may prove prejudicial to the *rights and liberties of the Gallican Church,(d) and to the authority of the King." The principal propositions maintained by this Parliament were embodied and promulgated in a Royal Declaration in the same year.

The Pope found no support. Maria Theresa coldly replied to his solicitations for aid, that it was not an affair of religion, but of State policy. Venice declared also against the Pope. The King of Naples invaded Benevento and Pontecorvo; the King of France Avignon and the Venaissin. All the Sovereigns demanded the recal of the Brief, and the Papal suppression of the Jesuits.

CCCXLVI. Clement XIII. died in the midst of this tumult. Clement XIV. (Lorenzo Ganganelli,) leaning rather to the Regalisti who counselled concession, than to the Zelanti, who wished to uphold all the claims of Rome, restored peace. He prohibited the reading of the Bull *In Cœnâ*, made concessions to Sardinia, sent a Nuncio to Portugal, suspended the *monitorium* against Parma, and in 1773, true to the policy of the Roman See in the case of the Templars,(e) pronounced the decree of dissolution against the most faithful soldiers of his see, the Jesuits.(f)

The Revolution was followed (1789) by the confiscation of the property of the Church, and what was called the civil constitution of the clergy, one main feature of which was that the Bishops, though they were to announce in writing their appointment to the Pope, were not to receive from him canonical institution, but from the Metropolitan or

(b) Coppi, i. p. 77. Martens Tr. i. p. 495.

(c) This *arrêt* (26th February, 1768) of Parliament is referred to a clear law in the first of the Organic Articles.—Vide post.

(d) Requisition of the Attorney-General and *Arrêt* of the parliament of Paris. Report of 1817, Parl. Papers, pp. 179–181.

(e) Vide ib. for Letters-Patent of the King in 1772, suspending the execution of the *arrêt*; but the substance of it was proclaimed in a Royal Declaration, 8th March, 1772.—Vide ib. pp. 178–181.

(f) Ranke.

senior Bishop. Thirty Bishops protested against these measures and the Pope condemned them in various Briefs.

CCCXLVII. We pass over the persecutions of the clergy, the history of the Constitutional Church, the consecration of *constitutional Bishops, and approach the second and the existing Concordat [*367] of France, namely, that between Napoleon and Pius VII. in 1801. It consists of seventeen articles.

The preamble recognized on the part of France, that the "Catholic Apostolic Roman religion" was that of the great majority of French citizens, and, on the part of Rome, that great advantages had accrued, and were expected, to this religion from the re-establishment of it in France, and the public profession of it made by the Consuls; that a new arrangement of diocesses, "*de concert avec le gouvernement*," should be made; that the First Consul should nominate, and the Pope institute Bishops, according to the ancient forms used in France; that the Bishops and Ecclesiastics of the second order, before entering into their functions, should swear obedience to the Republic, and not to abet by council or undertake any plot, "*soit au dedans soit au dehors*," contrary to the public tranquillity, and to reveal anything of the kind to the Government. It provided that the First Consul should have the same rights and prerogatives as the ancient government. This Concordat was followed by certain Bulls, "Indults," and Briefs(*g*) on the part of the Pope, the most remarkable of which was the Brief *Tam multa*, in which the Pope, in order to facilitate the new arrangements with Bonaparte, obliged eighty-one Bishops, admitted to be "*anciens et véritables Evêques*," as the reward of their fidelity to the Church, and their loyalty to the Crown, to resign their sees. Forty-five submitted; thirty-six(*h*) resisted. It should never be forgotten that the Pope proceeded, by the Bull *Qui Christi Domini*, to deprive these thirty-six *prelates of their sees, [*368] without a form of a canonical judgment, without an allegation of fault, much less of crime, upon the naked plea of the necessity of the time. Civil history might be searched in vain for an act of more flagrant injustice. Ecclesiastical history affords no precedent, and will, it may be hoped, afford no imitation, of so barefaced a contempt for all moral right as well as all Canonical Law and custom. The very apology gave the enemies of religion the occasion of rejoicing at the practically acknowledged dependence of the Church upon the State.

CCCXLVIII. Little good accrued to the Roman See from the servility to Napoleon. On the very day upon which the Concordat was published *articles organiques* of the Government were issued; which, though remonstrated against by the Pope, and though their abrogation formed a part of the abortive Concordat of 1817,⁽ⁱ⁾ remain, it should seem, to this day

(*g*) *Ecclesia Christi*, 15th August, 1801. *Qui Christi Domini*, 30th November, 1801. Indult. Apostolicæ Sedis, 9th April, 1802, by the Pope's Legate, Caprara, diminishing the number of Festivals.

(*h*) Some of these retired to England. They formed what was called "*La Petite Eglise*," and which, like the Nonjuring Church in England, continued to exist for some time. Indeed, it would appear not to have been wholly extinct in 1852. For some account of them, see *The Guardian* of February 4, 1852.

(*i*) Lequeux, iv. 400.

a *loi de l'Etat*.(k) These articles were prefaced by Portalis (no mean name in French jurisprudence.) They contain provisions with respect to the *verification of Bulls*, the *Delegates of the Pope*, the *Decrees of Councils held out of France*, and of *General Councils*, and of the *Appel comme d'abus* (with a very long enumeration of possible cases for its exercise,) which secured the independence of the kingdom in a more stringent manner than any preceding edits or regulations had done.(l) The memorable journey of Pius VII. to Paris, his consecration of Napoleon, their subsequent quarrel, chiefly on the Bulls of institution, the outrage offered to the Pope at Rome, Napoleon's demand that the Holy See, in logical consistency with its claims and position,(m) should cease [*369] to *hold any communion with Schismatics like Russia and England. The final annexation of the Papal dominions to France by the decree of Schönbrunn(n) (17th May, 1809,) the scandalous seizure of the Pope, his imprisonment(o) at Savona and Fontainebleau, and the excommunication of Napoleon, are pages of history well deserving of study, but which the limits of this work compel us to pass by; nevertheless, it belongs to the object of this chapter to notice that Napoleon sought to justify his outrage by referring to the donations of his "auguste prédécesseur," Charlemagne, to the Roman See, as having caused an incompatible mixture of temporal and spiritual power, fruitful in discord, because it had always induced the Pope to employ the influence of the latter to support the pretensions of the former.(p) At the very time when Napoleon brought these charges against the Pope, he meant to make his spiritual power a political instrument, and to fix his residence in France.

CCCXLIX. The Pope resorted for his defence to the weapon of his predecessors; he issued a Bull(q) of excommunication, not against Napoleon by name(r) but against all who had in any way perpetrated, connived, assisted at, or counselled the division and rapine of the Holy See. This is the last instance in history of the exercise of this power by the Pope. It was couched in different language(s) from the Bulls against Henry VIII. and Elizabeth; it did not call upon the subjects of the ex-

(k) The clause for its abrogation was one of the impediments which prevented the execution of the proposed Concordat; for the clause would have required the consent of the Chambers, which could not be obtained.—Ib. 402.

(l) Article 23, and 24, provided for the teaching in all schools of the four Gallican propositions.

(m) Schoell. Archives Historiques et Politiques, ii. 3.

(n) Koch, Hist. des Tr. iii. 115.

(o) Napoleon's conduct was shameful, and wholly indefensible. But it is sometimes forgotten that the great Charles V. at the same time imprisoned the Pope and prayed for his deliverance from captivity, and that Charles V. was never excommunicated.

(p) It is truly said by Ranke, that the Constituent Assembly meant to detach itself from the Pope, the Directory to destroy him, and Napoleon to make him a tool.

(q) In the *Memorie del Cardinale Pacca*, i. 234, this Bull is to be found in extenso. I cannot discover it in the volume of the *Bullarium* which relates to Pius VII.

(r) "Gubernium Gallicanum" occurs in the instrument.

(s) De Pradt, ii. 406-7.

communicated Prince to rebel, or *upon foreign powers to invade his territory, but it refused absolution from the penalties of the [*370] *Major Excommunicatio*, “donec omnia quomodolibet attentata publicè retractaverint revocaverint cassaverint et aboleverint, ac omnia in pristinum statum plenariè et cum effectu reintegraverint, vel alias debitam et condignam Ecclesiæ ac nobis et huic sanctæ Sedi satisfactionem in præmissis præstiterint.”(t) The spiritual power of the Pope was therefore exerted, if not to extend as it had been in 1707 and 1768,(u) yet principally to recover territorial right and property: all these latter excommunications were practical applications of the article in the Council of Trent(v) which has been mentioned above, and which was cited in the Bull of Pius VII.(x)

CCCL. At Savona the Pope consented, if consent can be predicated of a prisoner, to the demand of his captor, that when a Bull of institution had been refused by him on other grounds than those of personal unworthiness, the institution should devolve after six months on the Metropolitan.(y) This provision, which Roman Catholic Princes have always striven for in vain, was also inserted in the fourth article of the Concordat, signed at Fontainebleau, January 25, 1813.(z) That Concordat the Pope, as is well known, afterwards, though by no means immediately afterwards, repudiated, and it may always be truly said that, inasmuch as the free agency of both parties is of the essence of a valid contract, and the Pope was at this time a *prisoner,(a) and not permitted to consult [*371] with the advisers whom he would have chosen, his approbation was an extorted act and null. Nevertheless, the great feature of this Concordat was to secure religious peace to France; it prevented the possibility of the clergy and laity of France being deprived of the functions of the Bishops at the arbitrary will of a foreign spiritual power. The Pope would have been no longer able to refuse institution to a canonically qualified nominee of the Prince, without assigning any reason, or assigning one which had a clear reference to temporal, and not to spiritual grounds. The Prince was obliged to nominate within six months, and the Pope to institute within the same period, otherwise the institution devolved on the Metropolitan, or on the oldest Bishop of the province. Such a scandalous vacancy of sees, as has been already mentioned, could never, under these regulations, have again disorganized the Church.(b)

(t) *Memorie del Card. Pacca*, p. 247.

(u) To support the claims of the Papal See to the Duchy of Parma, the Pope twice issued excommunications—once in 1707, once in 1768—against the Duke of Parma.

(v) Sess. 22, c. iv. is mentioned in Pacca, but it must be a misprint for xi.

(x) De Pradt, ii. 324. See the instrument of consent, p. 470.

(y) This was also declared, after the failure of the Ecclesiastical Council in 1811, by the Edict of 5th August, 1811. The Pope at Savona agreed to this, but the Metropolitan was to institute in the name of the Pope.—De Pradt, 501, 512, n.

(z) See this Concordat, Pacca, ii. 215.

De Pradt says that Pacca belonged to that class of men “faits pour tout gêner.”

(a) “Ma ci siamo in fine sporcificati (sporcati.) Quei Cardinali . . . mi strascinarono al tavolino, e mi fecero sottoscrivere,” Pius VII. said to Pacca. At the same time, it would seem, from what passed between them, as if, at that time, the Pope did not intend to rely upon the contract being void, as extorted by force.—Pacca, ii. 196-9.

(b) De Pradt, iii. 13.

CCCLI. The restored House of Bourbon endeavoured to effect a fourth Concordat, that of 1817, by which the Concordat of Francis I. should be re-established; that of 1801, and the organic articles abolished: but the attempt(c) was vain.(d)

CCCLII. We have now to consider the Papal relations with Germany, and especially with Austria.

The effect of the Council of Trent(e) was to strengthen the power of the Pope in those parts of Germany where a re-action had given the Roman Catholics a decided triumph over the Protestants.

[*372] *This increase of power was principally established and exercised through the intervention of the Papal *nuntius*.

The necessity of arranging the vexed state of ecclesiastical matters in Germany, had, ever since the reign of Charles V., afforded the Court of Rome an excuse for a perpetual *nuntius* at the Imperial Court.

The necessity of the Papal consent to the interpretation and execution of the Tridentine decrees, confirmed and enhanced the authority of this minister. In 1566, a *nuntius* had also been established at Lucerne, for Roman Catholic Switzerland and for part of Germany. During Clement VIII.'s Papacy (1591-1605,) the *nuntius* at the Imperial Court was armed with full powers, and, for a considerable space of time, the Church in Germany was more immediately under the control of the Roman See, than it had been at any time before the Reformation, while the rights and functions of her Bishops were overridden and enfeebled, if not quite absorbed, by the *plenitudo potestatis* of the Delegate of the Pope.

The struggles, however, of the Gallican Church to restore the Church to the primitive state in which she existed before the False Decretals had been forged, to maintain the independent substantive rights of her native Episcopacy, and to confine the primacy of the Pope to the definite object of upholding, by his Patriarchate, the visible unity of the Church—these struggles were not without their effect in Germany, and especially in the vast domains of the House of Austria.

The beginning of the eighteenth century produced the great work of Van Espen.(f) It placed what has been called by German writers the Episcopal System, upon foundations too deeply laid in historical erudition(g) to be shaken by any answer of the Roman See.

[*373] *The work remains to this day the great light of Canonical Jurisprudence. Upon the principles which it contains, the relations of Church and State, both with each other and with Rome, might find a peaceable and equitable adjustment.

(c) See this embryo, Ib. iii. 76, n.

(d) The negotiations continued till 1822. The Bull, *Paternæ Pietatis*, recognising eighty French sees, appeared 10th October, 1822.—Lequeux iv. 406, &c.

(e) Eichhorn, I, B. i. Abschn. iii. c. 1, p. 294. Phillipps, 338, as to the effect of the *paritat* system on the Empire.

(f) The *Jus Ecclesiasticum universum hodiernæ disciplinæ*, was published at Cologne, 1702; also *Tractatus de promulgatione legum Ecclesiasticorum ac speciatim Bullarum et Rescriptorum Curie Romanæ*. Van Espen was born 1646, and died 1726.

(g) For which, however, he was much indebted to Thomassinus, and to the invincible argument drawn from that source.

CCCLIII. The Episcopal system received a yet further support from the writings of the Suffragan Bishop of Treves, *(h)* Von Hontheim, *(i)* and from the writers who flourished under the protection of Maria Theresa and Joseph II. The reforms of this Emperor, hastily, perhaps, and arbitrarily executed, were not ill received by his subjects. So far as they related to the relations of Austria with the Roman See, they greatly curtailed the power of the Pope; they conferred upon the Bishops authority over the Religious Orders, and forbade the latter to have any relations with any foreign spiritual powers. Dispensations were no longer to be obtained from the *nuntius*, but from the Bishop; the "*recursus*" to Rome from the national spiritual tribunals was greatly restricted; the promulgation of all Papal Briefs or Bulls was to depend upon the permission of the Crown, signified by the *Placet* or *Placitum regium*.

By Imperial Decrees *(j)* of 1767, 1781, 1791, all Papal rescripts, as well originals as copies, are to be submitted to the provincial Government, and afterwards to the supreme tribunal, with the opinion of the Attorney-General and of the provincial Government thereupon. This law, however, applied *to all Papal rescripts of former times. [374] No one would use them without the imperial placet.

The right to examine the credentials of Papal Legatees, the right to dismiss, and the exemption from the obligation to them, was fully established; all Papal reservation of benefices was entirely done away with by the Decree of October 7, 1782. In 1781, the Minister, Prince Kaunitz, wrote an answer to the complaint of the Pope's Nuncio, in which he observed that abuses had been successively introduced "into the doctrine of Jesus Christ propagated by his Apostles" which were "contrary to the maxims of all good Governments; that the Pope had no authority whatever in the State, except on dogmatical or mere spiritual points; that the Emperor had only restored to the Bishops the rights which the Pope had wrongfully taken from them." *(k)*

CCCLIV. In the year 1786 the erection of a new Nuntiatura at Munich determined the Emperor to assemble at Ems the three Prince *(l)* Archbishops of Germany (Mayence, Treves, Cologne, and the Archbishop of Salzburg, in order to consult in what manner the German Episcopacy might recover the rights of which it had been deprived by the Pope. The result of their meeting was expressed in what the Germans call a

(h) Eichhorn, ubi supr. Phillipps, iii. s. 136.

(i) Under the assumed name of Justinus Febronius, *De Statu Ecclesiæ et legitimâ Potestate Romanâ: Bullioni et Francof.* 1763.—Ib. 1765.

Condemned by Clement XIII., 29th February, 1764.—Phillipps, ubi supr.

Pauli Jos. de Riegger, born 1705, died 1775, *Institutiones Jurisprudentiæ Ecclesiasticæ*, Pt. iv. Vindob.: 1776, 1771, 1777. Eybel, *Was ist der Papst?* (Wien: 1782.) Ebenders, *Was ist ein Bischof?* Schram, *Institutiones Juris Ecclesiastici Publici et Privati*, &c. Augsburg, 1774.

(j) *Enchiridion Juris Ecclesiastici Austriaci*.—Rechberger. (Lintz: 1809,) i. s. 272.

(k) See Parl. Papers, 1815-17, p. 84. Letter at length, *Storia del anno 1782*.

(l) Vide ante, their creation in Eichhorn, ubi. supr.

Punctation, signed at Ems by four Archbishops, the highest ecclesiastical authorities on this side of the Alps, in 1787-8.(*m*)

Their resolutions deserve careful study; they upheld the Episcopacy, and denied the claims of the Papacy, pretty much in the same manner as England and Queen Elizabeth, before her excommunication, would have done;(*n*) *for they expressly denied to the Papacy any [*375] authority or rights, but those which could be proved to have been attached to it in the first centuries. Joseph II., in spite of Pius VI.'s journey to Vienna, was eager to reform the Church upon the principles laid down by the Archbishops; but the Bishops collectively gave him no assistance. The furies of the French Revolution were about this time let loose upon terrified Europe; and in the midst of the tumult of the Revolution, the Pope condemned the Synod of Pistoja for adopting the maxims of the Gallican Church.

CCCLV. The scandalous treatment of Pius VI. by Napoleon, and the eminent piety and virtues of this Pontiff, caused a general reaction in his favour. After the dissolution of the ancient German Empire, in 1806, neither the "*Rheinische Bund*" nor the "*Deutsche Bund*,"(*o*) which succeeded to it in 1815, intermeddled in religious matters, further than to admit all persons professing christianity equally to civil and religious rights.

CCCLVI. The secularisation of the German ecclesiastical property was accepted as a fact of history by every body but the Pope, who formally protested against it at the Treaty of Vienna.

CCCLVII. By a very recent Concordat, Austria has entered into terms much more favourable to the Pope.(*p*)

CCCLVIII. It would surprise many superficial readers of history to learn that no countries have more strenuously resisted the aggressions of Rome than Spain and Portugal.(*q*)

[*376] *In the early annals of Spain, towards the beginning of the thirteenth century, Alonso X. makes no mention of Papal confirmation in the consecration of Bishops, when directions are given by him as to the manner in which they shall be chosen. The Kings of Arragon and Naples were in constant hostility with the Pope.

CCCLIX. It is true that, anterior to the Austrian Dynasty,—however much the monarchs of Spain might have protested against the various abuses of Rome, the sums of money extorted for dispensations, and the

(*m*) Joseph II., says Phillipps, iii. 378, "auf dem Puncte stand sich gänzlich von dem Oberhaupte der Kirche loszusagen."

(*n*) Report, &c. laid before Parliament (1816-17, reprinted in 1851) (pp. 86-96.) The whole proceedings at Ems are set out at length in translation. See also Resultate des Emser Congresses, von den vier Deutschen Erzbischöfen unterzeichnet, u.s.w. Frankf. u. Leipz.: 1787-8.

(*o*) Eichhorn, K. R., B. i. Abschn. iii. c. 1.

(*p*) With respect to Hungary, see Conspectus Juris Publici Regni Hungariæ, per Cziráky (Vienna: 1851,) t. ii. c. ix. De Jure Regis circa negotia Religionis præsertim, s. 479. The Pope confirms the Bishops nominated by the Crown; but the Bishop, before such confirmation, is entitled to the dress, revenues, rank, and seat, "sicut in Comitibus sic et in Synodis," belonging to his see.

(*q*) See papers, already referred to, laid before Parliament in 1814-1817, and 1851.

exemptions and exclusive privileges of the clergy,—the point upon which the monarchs chiefly showed an energy, beyond that of merely protesting, was, the nomination of Bishops, which they always maintained as an unquestionable prerogative of the Crown.

CCCLX. But after the Austrian Dynasty became seated on the Spanish throne, the ecclesiastical independence of Spain was much more firmly maintained. The hypocritical prayers of Charles V., for the liberty of the Pope whom he had imprisoned, have been already referred to.^(r)

In 1568, Philip II., in consequence of some attempt of the Pope to invade the Royal Prerogative, declared that he had a right to present to all the Bishoprics in Spain, and in 1588 created a Board (*Supremo Consejo de la Camara*) for the purpose of inquiring into and watching over the rights of the Crown, and preventing their invasion by the See of Rome. In 1633, Philip III. sent an embassy to Rome to demand a reform of various abuses, and the Pope conceded a certain measure of reform.

CCCLXI. When the Bourbons were seated on the Spanish throne, the mixed character of the Pope as a temporal and spiritual monarch, brought the Roman See into no small embarrassment.

In the European War of Succession, the Pope declared for the Austrian Archduke. Philip V., indignant at this display of partizanship, in 1709, forbade his subjects to hold any *communication with the See of Rome. In 1714, a Concordat was patched up between [*377] Clement II. and Philip V., which was never published, and never in fact, executed by Rome. The same fate attended another Concordat in 1717.

When the Infante Don Carlos conquered the Two Sicilies, the Pope intrigued with the Italian party, which provoked the Emperor of Austria; while the King of Spain (Philip V.) ordered the Cardinal Aquaviva to leave Rome, and to bring with him all the Spaniards resident there; and he promulgated several decrees, suspending every species of communication, civil as well as ecclesiastical, with the Roman See.

CCCLXII. In 1770, a Pragmatic Sanction was promulgated on the subject of communications with the Roman See, and in 1803, when the Archbishop of Nicea was made the Pope's Nuncio at Madrid, a special order was made by the King's Council as to the restrictions under which his office was to be limited. In 1805, the King put forth an Edict, which, reciting "that there existed at the Court of Rome many ecclesiastics and secularised priests, who were employed in negotiating pontifical favours and dispensations, and in offering them to the ecclesiastics," ordered that every pontifical grant or reservation should be authorised by the *Visto Bueno* of the King's general agent at Rome.

In 1806, "in order to strike at the root of the shameful traffic made in Rome by some Spaniards of the pontifical favours," a Royal *Cedula* directed that no dispensation or favour from the Roman Curia should be valid unless demanded originally by the royal agent resident at Rome.

In the reign of Ferdinand VII., a report was made to him upon the

(r) Vide ante, p. 363, n. (o.)

Papal Rights in Spain,^(s) in which, among other things, it was set forth —“Your Majesty is well aware that the Roman Curia is always under vows to oppose your Majesty’s prerogative. It is true that all Briefs and Rescripts from the Roman Curia must undergo a revision in this [∗378] kingdom; but *this, Sire, is a requisite not exclusively established in Spain, it is used in all Catholic kingdoms under different names, although always intended for the same purposes. It is called *Pase*, *Placito*, *Exequatur*, *Letters of Pareatis*, or otherwise, because all Sovereigns enjoy the same rights and have the same duties imposed on them.”

CCCLXIII. Before the death of Ferdinand VII., Amat de San Felipe, Archbishop of Nicea, succeeded Cardinal Fiberi as Nuncio at Madrid. The Pope’s Brief accrediting him to the office was still awaiting, according to the law, the signature of the Council of Castile, when Ferdinand died.

The practice of International Law required that the credentials of the diplomatic agents be renewed. The Spanish Government immediately communicated to the Pope the death of Ferdinand, and the succession of Queen Isabella II. by virtue of the Pragmatic Sanction of 31st March, 1830, (of which a copy was enclosed,) and the universal recognition of her Majesty by her subjects. The Pope replied that he must abstain from recognizing Isabella, and that he could not consider the Pragmatic Sanction as conclusive evidence of her right.

It is worthy of remark, that at so very recent a date we find the Pope maintaining in substance the old claim, sometimes said to be abrogated, but which appears always ready to be re-asserted and re-exercised, of interference in the political and civil affairs of a foreign independent nation. If it be said that the Pope only exercised his right as a temporal Prince in refusing to recognize Queen Isabella, then the event well illustrates the incompatibility of the mixed spiritual and temporal claims of Rome with the peace and independence of other nations. The consequences were, that political relations were broken off between Spain and Rome; that subsequently many episcopal sees became vacant, and [∗379] the Spanish *Government, strictly in accordance with the Concordat, nominated the new Bishops. The Pope, however, objected, not because the Bishops elect were objectionable on the grounds of learning, morality, or doctrine, but because, not having recognized Isabella II., he could not confirm her Bishops, which would imply his recognition of her title.

It appears that the Pope afterwards offered confirmation on condition that the presentation by the Queen was omitted, and that the words “*motu proprio et benignitate Sanctæ Sedis*” were inserted in their stead.

This attack upon the most cherished prerogative of the Crown was

(s) Parliamentary Papers, 1851, p. 305.

“Yá vé Vuestra Magestad que la Curia Romana está siempre en armas para hostilizar las regalías de Vuestra Magestad.” Again, “Contra las demasías de la Curia unas veces sorprendido otros engañada, siempre empeñada en estender sus facultades fuera de sus justos límites.”

firmly resisted: and this scandalous state of the Church in Spain actually continued till, in 1848, Queen Isabella was recognized by the Pope.(t)

CCCLXIV. Here then, as in the case of Napoleon, the Pope refused, on grounds strictly political, the exercise of a strictly spiritual power, without which the foreign country, over which he claimed to exercise it, and in behalf of which he would have appealed to the people against the Government, must be deprived of the most essential elements of its peace and well-being, namely, the reception and enjoyment of religious rites.

CCCLXV. It seems necessary to make some remarks upon certain Concordats which have been entered into between Spain and Rome. On the 26th of September, 1737, a Concordat was negotiated with Clement XII., but it was not satisfactory; and Ferdinand VI., under the advice of *his Minister, José de Carbajal, obtained through his ambassador at Rome Cardinal Portocarrero, upon the 11th of January, [*380] 1753, another Concordat, which regulated till 1851 the relations between Spain and Rome.

By this instrument,(u) the right of naming to vacant Bishoprics (*Patronatos*) in the kingdoms of Spain, Granada, and the Indies, which Rome had been for ever striving to obtain, and which Spain had always considered one of the first prerogatives of the Crown, was formally admitted to belong to the latter. The Pope reserved to himself fifty-two specified benefices, and was to receive 22,000,000 reales as a compensation for the loss of fees on Briefs and Annates.

On the 16th of January, 1762, a Pragmatic Sanction was ordered by his Majesty to be published, with the view of preventing, from this day forward, the circulation of any Brief, Bull, or Papal letters, for the establishment of any law, rule, or general observance, unless they be ascertained to have been previously seen by his Royal person; and of directing the Briefs or Bulls relating to transactions between private individuals to be presented in the first instance to the Council."

CCCLXVI. On the 16th March, 1851, a Concordat was concluded with Rome on terms more favourable to the Roman See,(v) than she had hitherto obtained. The Roman Catholic Apostolical Religion, to the

(t) Vide ante, Pt. 5, c. iv. as to RECOGNITION generally.

Far wiser and sounder is the course of religious policy recommended by Gioberti who maintains that Recognition is an essential Catholic doctrine:—"Quando un governo è stabilito, quando è riconosciuto dai vari poteri della nazione, e dal complesso degli altri popoli inciviliti e cristiani, è legittimo per ogni verso, qualunque possa essere stato il difetto della sua origine; perchè, supponendo eziandio questa origine viziosa, la legittimità gli è conferita, dal concorso degli altri poteri sovrani, interni ed esterni, che lo riconoscono. Tal' è la dottrina cattolica così nella teorica come nella pratica; tal' è la sola dottrina, che s' accordi coi principj della diritta ragione. Se le massime dei legittimisti fossero fondate, ed una dinastia riconosciuta da tutti i poteri interni della nazione, da tutti i potentati esteriori, senza escludere il capo supremo della Cristianità, fosse usurpatrice, non vi sarebbe forse un solo governo legittimo in Europa, e la giustizia politica non potrebbe conciliarsi colla quietà degli Stati."—Gioberti, *Introduzione allo Studio della Filosofia*, l. i. pp. 102-3.

(u) The Bull is printed in Spanish and English in the *Parliamentary Papers*, 1851.

(v) *Annual Register*. vol. xciii. p. 464, (1851.)

exclusion of every other form of worship, is to have the rights and prerogatives which belong to it according to the Law of God and the sacred canons.(x) The possessors of Church property are quieted in their possession.(y) The prerogatives of the Crown are *retained, [*381] and also the Convention of 1763, except in so far as it is abrogated from by this Concordat.(z)

CCCLXVII. The subject of the Papal Relations with Spain must not be dismissed without observing, that, when the year 1768 had produced, as has been already mentioned, the famous *Monitorio di Parma*, nowhere was this attempt of the Pope to use spiritual power for secular ends more fiercely attacked than in Spain. It gave rise to two very important State papers, in both of which the pretensions of Rome with respect to issuing orders of any kind which were to take effect in a foreign territory without the consent of the Sovereign, were most distinctly repudiated as contrary to the private law of Spain and the public law of Europe.

1. The Royal Regulation of the Lords of the Council of his Majesty,(a) whereby it was ordered that all copies of the *Monitorium* and all other writings, letters, or despatches of "the Court of Rome," infringing upon the Royal prerogative or other rights of Government, or likely to disturb public tranquillity, should "not be allowed to be published or printed; that, on the contrary, they are to be delivered immediately to the Council, under pain of death against the notaries and lawyers who act contrary to the present regulation, and of the other penalties pronounced against all other individuals in conformity with the dispositions of the 25th law, tit. 3, lib. 1, of the collection of statutes called *Recopilacion*, which is annexed." That law recites "that every day there are received in our kingdom regulations from the Court of Rome, derogatory to their pre-eminence and the immemorial customs of the country, and requesting a remedy," and then provides the penalty aforesaid.(b)

[*382] 2. The circular of the Minister accompanying the preceding *edict and prohibiting the publication of the Bull under severe penalties. Precedents were cited extending from 1551 to 1766, in which Spain had resisted and considered "as affronts," for which "satisfaction" was to be demanded, all attempts of the Court of Rome to promulgate any instruments affecting the subjects of Spain without the consent of the Crown of Spain. "All these precedents" (says the 22nd paragraph of this State Paper,) "with many more that are not stated here, the constant tradition of the learned in the law of the kingdom, and the practice of its superior courts of Justice, show evidently that the reasons of the said monitory *In Cœnâ Domini* have no force whatever in Spain, as far as they infringe upon the independent authority of Sovereigns in temporal matters, obstruct the functions of magistrates, *facilitate the pretensions of the Court of Rome*, and disturb the tranquillity of the country to which the harmony of the State and Church is so greatly conducive."

CCCLXVIII. The history of the Lusitanian Church and Kingdom present pretty much the same picture, as that of the other realms of Christendom, up to a certain epoch. Portugal is perhaps distinguished,

(x) Art. 1.

(y) Art. 42.

(z) Art. 44.

(a) Parl. Papers, p. 211.

(b) *Ib.* p. 214.

among modern Roman Catholic countries; for the firmness with which it has repelled the attempts of Rome to infringe upon national independence.

Towards the end of the eighth century,(c) after the expulsion of the Saracens, we find the clergy and people electing the Bishop, the Monarch consenting, the Metropolitan confirming, Provincial Councils, or Popes resorted to in case of doubt. From the beginning of the fourteenth to the middle of the fifteenth century, the Pope had usurped the right not only of confirming but of nominating Lusitanian Bishops. About 1440, Dom Alphonso V. firmly established the royal right of presenting to the vacant sees, though for some time the Bulls of confirmation contained the phrase *ad supplicationem* and not *ad præsentationem*. During the time, however, *that Portugal was under the Crown of Spain, the Spanish monarchs admitted no such limitation of their privilege, and after- [*383] wards when Portugal secured her independence, her Kings, Dom John IV., and V., steadily maintained this right; till at last Benedict XIV., by a decree of 12th December, 1740, determined that the appointment to all the cathedrals of Portugal should be "*cum clausulâ, ad præsentationem regis.*"(d)

CCCLXIX. King Joseph issued an edict, dated 6th April, 1768, forbidding, under severe penalties, the importation and promulgation of the Bull In Cœnâ Domini, and of the indices expurgatorii. Various subsequent royal edicts to Nuncios, Cardinals, Patriarchs, and Abbots-General, were issued, having for their object to prohibit the promulgation of Papal Briefs unsanctioned by the Placitum Regium; the same doctrine is repeatedly enunciated by the Portuguese publicists and jurists.(e)

In 1815,(f) the attempt of Pope Pius VII. to re-establish, by the Bull *Solicitudo omnium*, the Jesuits in Portugal, was met by the firm and peremptory refusal of the Government, and by an expression of their determination to "maintain in their utmost rigour," a municipal ordinance of a directly contrary tendency.

In 1822, the Pope's refusal to confirm the Episcopal nominee of the Crown produced the following significant remonstrance from Carvalho, the Minister of the Crown, addressed to the Portuguese Minister at Rome.

"If his Holiness should still persist in delaying the confirmation of the Bishop-elect as coadjutor and future successor of the Bishop of Coimbra, you will acquaint him, in the most formal manner, that His Most Faithful Majesty, while he holds the respect he owes to the Holy Apostolic See and to the Holy Father, as a sacred duty, holds it a no less sacred duty to uphold the rights of his *Crown—rights which his august [*384] ancestors so often and so gloriously upheld. If His Holiness should still persist in delaying the confirmation of the Bishop-elect as coadjutor and future successor of the Bishop of Coimbra, you will acquaint him, in the most formal manner, that His Most Faithful Majesty is firmly resolved to make use of the right established by the fourth Ca-

(c) Parl. Papers, 1851, Portugal, Historical Memoir, p. 111.

(d) Parl. Papers, 1815-16, p. 241.

(e) Ibid. 1816-17, pp. 231-239.

(f) Ibid. pp. 244-5.

non of the Council of Nice, 'Episcopum oportet maximè quidem ab omnibus qui sunt in provinciâ constitui;' and by the twelfth Canon of the Laodicean Council, 'Episcopi iudicis metropolitanorum,' a right which was confirmed by Innocent I., Dis. 64, Can. 5, by St. Leo in his letter to Anastasius of Cephalonia, by the seventh Council in the second Canon, and finally understood and confirmed as a general right in the Decretals of Gregory IX. His Holiness is aware that Bishops have been thus confirmed and consecrated for thirteen centuries; and, as the holy Church of Jesus Christ neither did nor could change character, the Bishops confirmed and consecrated now as they were in those happy times, are as much Bishops, and have the same jurisdiction and authority as they possessed during these thirteen centuries. For the more prompt and legal execution of this resolution, His Majesty even now keeps vacant the Bishopric of Tangiers, which is in the Royal gift, as you yourself have lately observed.

"Finally, you will inform His Holiness, that the abuse of authority frequently occasions the adoption of measures of expediency and emergency; and that should His Majesty decide upon the confirmation and consecration of one Bishop in this manner in his dominions, he will follow the same course and the same doctrine of the Church with regard to all Bishoprics which he may have to bestow." (g)

This despatch was dated 8th February, 1822. In a subsequent despatch to the same minister upon the same subject, dated 13th March, 1822, Carvalho, after citing Van Espen as *authority for the *jus* [385] *commune* of the Church, and declaring that His Majesty was acting both "as the defender of the canons of the Church," and also of "the rights of his Crown," concludes, "But if you see that the spirit of prepossession or rather of discord is perceptible in the Vatican, you will make use of the instructions which His Majesty directed to be sent to you on the 8th of February this year, protesting against the innovation and the false doctrine of paying more attention to a private letter than to legal testimonials: and you will prepare a note, stating to His Holiness, that His Most Faithful Majesty renews his declaration of adhesion and faithfulness to the Apostolic See, *but that availing himself of the rights of the general law (mas que utilizando se do direito commum) and of the best ages of Christianity, he not only proceeds to the confirmation of the Bishops of his kingdom by the Metropolitans, but determines that both the one and the other shall grant the dispensations and the spiritual favours which they may grant as the successors of the Apostles and the depositories of the authority necessary for supplying the wants of their Churches and flock; depriving of his royal approbation all and any Bulls issued in Rome, or here, by the Apostolic Delegate. Such are His Majesty's orders to you.*" (h)

CCCLXX. The language of these instruments and their date are remarkable. In them not only the superiority of the *jus commune* of the

(g) Parl. Papers, 1851, pp. 139-40.

(h) Parl. Papers, 1851, p. 143. In the first despatch it is said: "His Holiness, in the present instance, has no right to judge unless *secundum allegata et probata*" (*Sua Santidade no caso presente não tem direito de julgar, se não secundum allegata et probata.*)

Catholic Church over the Pope, and the rights of the Crown are distinctly asserted, but, as appears in the last extract, a position is taken up scarcely, if at all, different from that which has been since the time of Henry VIII. occupied by the national Church of England.

*CCCLXXI. There is no existing Concordat between(*i*) Portugal and Rome. There appear to have been Concordats of Pedro [*386] I. and John I., but none of later date.

CCCLXXII. We have now to consider the Papal relations with the Kingdom of the Two Sicilies.(*j*) By a Bull, dated A. D. 1076, Pope Urban II. created Roger, Count of Calabria and Sicily, perpetual Legatus of the Roman See,—a distinction which has been transmitted to the existing monarch of the two Sicilies.

By a Bull(*k*) of 1139, Innocent II. confirmed the act of his predecessor, whereby the kingdom of Sicily, the Duchy of Apulia, and the principal-ity of Capua, were conferred as a feudal tenure upon Roger II.

CCCLXXIII. This tenure continued till a very late period. For six centuries the white palfrey (*chinea*) and 7000 golden ducats had been claimed, and generally obtained, by the Popes, as the mark of the feudal homage due from the Crown of the two Sicilies.

It was not till the year 1776 that Ferdinand (the First(*l*) of Naples) availed himself of a quarrel which arose during the ceremony of present-ing these gifts, between the Ambassador of Spain and the Governor of Rome, altogether to get rid of this homage.(*m*)

Lamenting that an act of devotion towards the Holy Apostles should have given rise to a public quarrel, he announced, or rather his able min-ister Tanucci announced, that henceforward *the ceremony of [*387] presenting the palfrey should altogether cease, and that the ducats should be privately presented as the free gift of a devoted son of the Church.

Rome protested(*n*) then, and, it is said, protests now, against this dis-obedience of the Neapolitan Court.

CCCLXXIV. The Two Sicilies, after the expulsion of the Anjouan race, followed the policy of the Arragonese, Austrian, and Spanish king-doms, to which, until the middle of the last century, they were succes-sively appended.(*o*)

The Spanish Viceroy refused to give the Royal Exequatur to the pro-

(*i*) Parl. Papers, 1851, p. 108. Ib., 1816–17. Attorney-General's Petition, p. 234. The originals are said to be in the Royal Archives of Torre de Tombo, and to be found in Gabriel Pereira de Castro's *Monomachia*, at the end of his first Treatise, *De Manu Regiâ*.

(*j*) Schmauss, i. 1. "Nullum in terrâ potestatis vestræ, præter voluntatem aut consilium vestrum Legatum Romanæ Ecclesiæ statuemus." The conquest of the Saracens and the aid borne to the Church are assigned as the meritorious cause of the extraordinary power.

(*k*) Ib. 1.

(*l*) Sometimes called Ferdinand IV.

(*m*) Colletta, *Storia del Reame di Napoli*, l. 2, xiii.

(*n*) "E il Papa rifiutandoli dichiarò più che mai solennemente le sue ragioni e la disobbedienza (così la diceva) della corte di Napoli."—Colletta, *Storia del Reame di Napoli*, l. 2, xiii.

(*o*) The House of Anjou reigned at Naples about 160 years after they had been expelled from Sicily in 1282. Alphonso of Arragon first took the title of King of the Two Sicilies, A. D. 1442–3.—Giannone, l. xxv. c. 7.

mulgation of the Council of Trent; and though the decrees of that Council were allowed to be dispersed over the kingdom, orders were sent to the President and other officers of the kingdom to suffer no innovation to be introduced injurious to the royal prerogative.

The Bull In Cœnâ Domini was as stoutly resisted, and the necessity of the Regium Exequatur(*p*) as steadily maintained as in other countries.

CCCLXXV. In 1728, Benedict XIII. decreed that the service in honour of Pope Gregory VII. should be performed by the secular and regular clergy. The decree was reprinted *and published at Naples. [*388] The Secretary of State(*q*) reported to the Emperor Charles VI. that he had found, in the service ordered to be used, these words; “*contra Henrici imperatoris impios conatus fortis per omnia athleta impavidus permansit, seque pro muro domui Israel ponere non timuit, eundem Henricum in profundum malorum prolapsum fidelium communionem, regnoque privavit, atque subditos populos fide ei datâ liberavit.*” The meaning of these words,” continues the Secretary of State, “appearing to me too injurious to the authority of Princes, too favourable to seditions, and contrary to the tranquillity of the State, I thought it right to leave the business to the Delegate of the Royal Jurisdiction, that he might lay it before the Court, as he did in my presence, where the import of the said words having been duly weighed, they were easily perceived to betray the vast design harboured by the Court of Rome to attempt to make itself a Sovereignty over all the temporal Princes and to render them, as it were, its subjects and dependants, so that the Papal Court might deprive Kings of their kingdoms, and transfer them to whomsoever it liked best—a strange and unjust conceit, directly contrary to the institution of the Pontificate. . . . The serious and intolerable evils accruing to the independence of Princes in general, and to your Majesty’s Imperial and Royal Rights in particular, from the publication of the aforesaid lessons, would authorise us, in imitation of the usages and the prudence of the Court of Rome, to prohibit the lessons themselves, charging the Bishops not to insert them in the Breviary. But,” continues the Secretary, alleging various reasons, “it is thought more advisable simply to order the printers to be confined, and all the copies of the said lessons to be seized, for no other ostensible motive than because a foreign publication had been imported, reprinted, and sold without any previous license, contrary to the Royal Regulations, [*389] *and particularly, because the reprint is said to have taken place

(*p*) In the thirty-third book of his History, Giannone devotes chap. iii. to the disputes about the reception of the Council of Trent; in chap. iv. he discusses the reception of the Bull In Cœnâ Domini, in chap. v. the necessity of the Exequatur Regium for all mandates from Rome: but see more especially the sixth chapter of the fortieth book, for the account of the strenuous maintainance by Charles VI. of the Regium Exequatur against Clement XI., “*Stabili fermamente la necessità del Regio Exequatur in tutte le Bolle, Brevi, o altre provisioni che vengono da Roma.*” This was vehemently condemned by Clement XI., but acquiesced in by his successor, Innocent XIII.

(*q*) Consultation of the Secretary of State, &c.

with the permission of the magistrates, when no such permission had been granted.(*r*)

CCCLXXVI. (*s*) In 1761, the Secretary of the Delegates of the Royal Jurisdiction at Naples, referring to what had been done in 1728,(*t*) prohibited in the kingdom the use of *ordinarii* (prayer-books) which contained directions for reading the service to Gregory VII., and the Bull *In Cænâ*, and what were called "*casus reservati Eminentissimo et Reverendissimo Domino*."

In 1769, Ferdinand I., by the advice of Tanucci, would not allow the Papal(*u*) confirmation of the Archbishop of Naples to contain the words, "*Per grazia della Sede Apostolica*." Shortly afterwards, the Pope refused to consecrate the Bishop nominated by the Crown to the See of Potenza, and persisted in the refusal till the King wrote to him that, if the consecration should be longer delayed, he would cause each new Bishop, in every province of his kingdom, to be consecrated by three existing Bishops, according to the ancient practice of the Church.

CCCLXXVII. (*x*) The existing Concordat(*y*) between Rome and the Two Sicilies bears date the 16th February, 1828; the 29th article of which contains the following oath:—

"I swear and promise, on the holy Gospels of God, obedience and allegiance to his Royal Majesty; and I also promise, that I will have no communication, that I will not partake in any design, that I will maintain no suspicious connection, either at home or abroad, which may endanger public tranquillity; and that if I am aware that any machination *is being carried on, whether in my diocese or elsewhere, to the [*390] disadvantage of the State, I will make the same known to his Majesty."(*z*)

CCCLXXVIII. With respect to the Kingdom of Sardinia, the Dukes of Savoy appear to have had, like other Sovereigns, contests with the Pope at an early period.(*a*) The earliest document relating to that part of the Regale which concerns the nomination to bishoprics in the kingdom of Sardinia, is a Brief of Nicholas V., in which he promises Louis II., Duke of Savoy, never to institute any persons to any archbishopric, bishopric, or abbey, "*nisi habitis prius per nos intentione et consensu ipsius Ducis*."(*b*)

CCCLXXXIX. The Right of Royal Nomination was further confirmed by a Brief of Leo X., in 1515, in the text of which the above expressions of Nicholas V. were referred to, and by the Brief of Clement

(*r*) Parl. Papers, 1816–17, pp. 151–4.

(*s*) Ibid., p. 156.

(*t*) Consultation of the Marquis Nicolas Fraggiani, &c.

(*u*) Pius VI.

(*x*) Parl. Papers, 1851, pp. 274–278, where it is set out.

(*y*) A Convention, which I have not seen, is said to have been drawn up in 1838.

(*z*) Parl. Papers, 1851, p. 287.

(*a*) Ib., 1816–17, 1851. Six volumes of Treaties between the House of Savoy and Foreign Powers are referred to.

(*b*) "*Neminem præficiemus seu illis (alluding to archbishoprics, bishoprics, abbeys) de quorumcunque personis non providebimus nisi habitis prius per nos intentione et consensu ipsius Ducis, de personis idoneis ad hujusmodi regimine seu dignitatis promovendis, vel de quorum personis tales provisiones fuerint faciendæ.*"

VIII., on the 19th of June, 1595, to Duke Charles Emanuel. There are also Briefs of Sextus IV., Innocent VIII., and Julius II., restricting and prohibiting the nomination of strangers to benefices in Sardinia.

The royal privileges were admitted, by a Brief of Innocent XII. on July 31, A. D. 1700, to extend to the dominions of the House of Saxony, south of the Alps. This was in the reign of Victor Amedeus, the first King of Sardinia.

CCCLXXX. By three successive Concordats of 1727, 1741, 1750,(c) the Regale was further confirmed, and extended to Churches formally excepted; and the claims of the Roman *Curia* to the revenues of vacant [*391] benefices, and to the property *of deceased clergymen, were abandoned. In 1728, the civil and ecclesiastical rights were clearly defined by Victor Emanuel, in the Code Vittorina, notwithstanding the opposition of Clement XII.

CCCLXXXI. By the Regulations of 1770, (s. 6, c. 1,) it is provided, that the nominations made by the Crown to the higher or *consistorial* dignities, and which have been sent to Rome, shall be expedited by the Secretary of State for Foreign Affairs; the patents of collation to any ecclesiastical office shall be expedited by the Secretary of State for the Home Department. In 1831, a Minister for Ecclesiastical Affairs was appointed, and upon him are now devolved the ecclesiastical duties of the Home Secretary.(d)

CCCLXXXII. By a Royal Decree of 21st December, 1850, (s. 7, Article 2,) it is provided, that the Council of Munster shall deliberate on the proposition relating to archiepiscopal and episcopal sees, and that the Minister for Foreign Affairs shall carry on all ecclesiastical negotiations with Rome.

CCCLXXXIII. As to the form of nomination to the Pope, the King's representative at Rome delivers to His Holiness the royal letter announcing the individual nominated to the vacant see. Formerly these letters contained the expressions "*in virtù*" or "*in forza del diritto che ci compete nominiamo,*" &c.; but now the simpler form, "*abbiamo nominato come nominiamo il — alla vacante mitra,*" &c. They conclude with a request that the Pope will order the necessary provisions (*providenze*).

CCCLXXXIV. The right of the Exequatur has been always carefully maintained in Sardinia.

The most ancient history of this country has records of the necessity [*392] of the approval by the civil power of the provisions of *the Roman See. The inspection of these documents was at first intrusted to the Governors, afterwards to the Supreme Courts of Justice or the Senates. The instructions to these bodies were that no Bull, Brief, Letters, or Decree, should be published or executed until it had been presented for the Exequatur. Notaries were strictly forbidden to exercise their calling in the way of recording or authenticating any pro-

(c) Confirmed by a Brief of 11th June, 1791.

(d) By the 18th Article of the Constitution, the Crown exercises the rights of the civil power in the matter of benefices and nominations.

By s. 1, of Article 6, of the Royal Decree of 21st December, 1850, the royal patronage belongs to the Minister for Ecclesiastical Affairs, Grace, and Justice.

vision proceeding from Rome, for which the Exequatur had not been obtained. The right of the Exequatur was, moreover, recognized by Benedict XIV. in his "Concordata Istruzione Pontificia" of 1742, which had reference to the Concordat of 1727.

In 1787, a Sardinian agent was established in Rome, according to the example of other Courts, with a royal office, through the agency of which, all petitions, without exception, of Sardinian subjects, for provisions which were to have effect "*nel foro esterno*," were to be obtained. When Genoa was annexed to the Sardinian monarchy, the Legation of Piedmont was extended to this new acquisition.

And lastly, by the Decree of April 25, 1848, all provisions from Rome must receive the Royal Exequatur before they can be considered by the tribunal, or executed by the prelate or any party charged therewith. The only exceptions appear to be provisions respecting matters purely spiritual, such as dogmatical Bulls, indulgences, jubilees, &c.

In Savoy and the other provinces, where the Gallician customs are still in use, nothing is exempt but the Briefs of the Sacred Penitentiary or the sealed letters sent to confessors with powers reserved to the Pope to absolve from certain sins.

CCCLXXXV. The ancient Florentine Republic,^(e) the Government of the Medici, and of the Austrian and Bourbon family, have been in succession equally watchful to prevent any *infringement of the sovereignty of the State by the act of any foreign power. [*393]

CCCLXXXVI. Under this category they appear always to have considered the exercise of Papal authority within their dominions, which has been regulated by a series of laws issued by the sovereign authority of the State, and which have been constantly enforced; and the necessity of the Regium Exequatur has been maintained in Tuscany with great vigilance.^(f)

On the occasion of the vacancy of an episcopal see, the Sovereign of the Grand Duchy causes a list of four candidates to be presented to the Pope, with an understanding that the first must be chosen, even if he be not duly qualified.

This custom appears to be immemorial, and to have been sanctioned by various pontifical Briefs. Every subject of the Grand Duke must obtain the permission of the Government previously to applying, in any matter of ecclesiastical jurisdiction, to the Pope; and every Brief or Decree obtained in consequence of the application must be sanctioned by the Placet or "*Regio Exequatur*" of the Sovereign, without which no Papal Brief, Bull, or Decree has any judicial validity in any civil or temporal matters.

CCCLXXXVII. A recent Concordat has been entered into between Rome and Tuscany, and, like that of Austria, very favourable to the Roman See.

CCCLXXXVIII. No State ever more strictly resisted the Papal authority than Venice.^(g) She excluded ecclesiastics from the councils and

(e) Parl. Papers, 1816-17, p. 109. Ibid., 1851, p. 329.

(f) See especially the Circular Letter of Duke Leopold, 25th October, 1797.

(g) Parl. Papers, 1816-17, p. 106.

public employments of the State. The Government of her Church was divided between the patriarchates of Venice and Aquileia.

When Sixtus IV. excommunicated Venice,^(h) the Council of Ten ordered the Patriarch and all the Venetian clergy to transmit, unopened, [*394] to the inquisitors of the State any Bull *that might be addressed to them by the Holy See. These commands were strictly obeyed. An appeal was lodged with the tributary Patriarch to a future council, from the sentence of excommunication. The Patriarch, in consequence of the appeal, suspended the interdict, and sent a summons to the Pope to appear before a future Council.

In 1754 the Venetian Senate put forth a decree, forbidding the publication of any Bull; and in the same year expressly prohibited Venetians from applying to Rome for any dispensation which could not be obtained through the Bishop, and from applying at all to Rome except through the Bishop.

CCCLXXXIX. (i) With respect to Bavaria, the Treaty which regulates the relations between that kingdom and the See of Rome is the subsisting Concordat of 1817.^(k)

It begins as follows: "Sanctitas sua Summus Pontifex Pius VII. et Majestas sua Maximilianus Josephus Bavarie Rex, debitâ sollicitudine cupientes, ut in iis quæ ad res ecclesiasticas pertinent certus stabilisque in Bavarie regno terrisque ei subjectis constituatur ordo, solemnem propterea *conventionem* inire decreverunt."

It provides for the nomination of Bishops by the Crown to be followed by the confirmation of the Pope, and that the prelates shall take the following oath on their installation:—

"Ego juro et promitto ad sancta Dei Evangelia obedientiam et fidelitatem Regiæ Majestati: item promitto me nullam communicationem habiturum, nullique consilio interfuturum, nullamque suspectam unionem neque intra neque extra conservaturum quæ tranquillitati publicæ noceat, et si tam in Diocesi meâ quam alibi noverim aliquid in Statûs damnum tractari, Majestati suæ manifestabo."

*CCCXC. Contemporaneously with this Concordat was promulgated [*395] what is called the "Religion Edict"^(l) in the Bavarian Constitution (Part 3, par. 58, 59,) containing these provisions:—

"58. In conformity to the general mandates hitherto existing in the royal dominions, no laws, ordinances, nor other regulations issued by the Church shall be promulgated and carried into effect without the sovereign concurrence and sanction. The clerical authorities are bound, after receiving the royal sanction for the promulgation (*placet*), to state the same expressly on all occasions, at the outset of the publication of the ordinances issued by them.

"59. Public notices issued by the clerical Government, which refer solely to the priesthood under its authority, and which emanate from

(h) Sismond de Sismondi, Hist. des Rep. de l'Ital., ii. p. 235.

(i) Parl. Papers, 1851, p. 47.

(k) Eichhorn, Kirchenrecht, B. iii. Abschn. i. 11, p. 564. Philipps, Kirchenrecht, B. iii. Kap. 10, Abschn. 145.

(l) This Concordat will be found in the Appendices to the works of Eichhorn and Philipps, and in the Parl. Papers of 1851.

approved and universal regulations, require no renewed sanction. This *placitum regium* is accorded by the King."

In 1824 these provisions were revised and extended.

In 1852 a Concordat was signed between the Pope and the President of the Republic of Costa Rica, which provides :—

Art. 1. The same declaration as in the last Spanish Concordat as to the Roman Catholic Religion.

Art. 4. That the Sovereign Pontiff being the chief of the Universal Church, the Bishops, Clergy, and People may have free intercourse with him,

Art. 7, 8. A power of Nomination granted in return for Dotation.

Art. 14. "That taking the times into consideration, civil causes and temporal rights of ecclesiastics are to be tried before lay judges."

Art. 20. That no obstacle be interposed to the erection of monasteries or nunneries.

*Art. 23. Public prayer to be—

[*396]

"Domine salvam fac rempublicam.

"Domine salvum fac Præsidum ejus."

Art. 26. All laws, &c., at variance with this Convention are annulled.(m)

*CHAPTER VIII.

[*397]

THE INTERNATIONAL RELATIONS OF THE PAPACY WITH FOREIGN STATES
IN WHICH A PROTESTANT CHURCH IS ESTABLISHED.—BULLIÆ CIR-
CUMSCRIPTIONUM.(a)

CCCXCI. THE territorial changes in Europe,(b) and, indeed, in the world, which followed upon the Treaty of Vienna, brought the Roman See into immediate contact with Protestant States, with which it had hitherto had no relations. By that treaty, territories inhabited for the most part by Roman Catholics, accustomed to acknowledge the supremacy of the Pope as an indispensable part of their religious belief, were transferred to Sovereigns who had always considered the rejection and denial of his authority as necessary for the political and religious welfare of their dominions. Rome had no longer to deal exclusively with those Princes, who bore, as their proudest distinctions, the religious titles which she had conferred upon them. Her intercourse was no longer to be confined to His Most Christian Majesty, The Catholic King, His Most Faithful Majesty, or His Apostolical Majesty.

The Duke of Muscovy, whom Rome had not long ago regarded with Chinese indifference as an outside barbarian, had become one of the most

(m) *Annuaire des Deux Mondes*, 1852. See De Pradt, *Concordat de l'Amérique avec Rome*. (Paris: 1827.)

(a) De Pradt, *Les Quatre Concordats*, t. i. avant-propos,

(b) Walter, ss. 42, 43., as to the Greek Church.

powerful European potentates, uniting to his ancient title of Chief of the Greek Church, that of Protector of ten millions of Roman Catholic Poles. The King of Prussia, whom fifty years ago Rome had still addressed as [*398] *the Marquis of Brandenburg, had grown into a powerful monarchy in fact as well as name; and had added to its compact military State two ecclesiastical electorates, besides Prince bishoprics, abbeys and chapters.

The Protestant Stadtholder of Holland had become possessed of that ancient inheritance of the Catholic Sovereigns, the Belgic provinces, and of the Prince Bishopric of Liège. Passing by, therefore, the revolutions of Roman Catholic Southern America, in Europe alone a new order of things had arisen, to which the application of Papal claims was a matter of great novelty and nicety, not the less so, on account of the remarkable circumstances connected with the Pope himself. For he did not pretend to be ignorant of a fact patent to the world, namely, that his restoration to Rome was mainly owing to the energies and the arms of schismatical and heretical powers; that Russia and Prussia—and, above all, excommunicated England—had been the principal instruments in re-seating him upon the pontifical throne, from which he had been dragged by Roman Catholic France.

CCCXCII. The first remark which is of importance, the object of this work being considered, is, that the Papal See has entered into no convention, strictly speaking, with any Non-Roman-Catholic State. Before the year 1850, the only Concordat since the Treaty of Vienna which had been entered into was one with Bavaria(c) in 1817, though a Concordat very favourable to Rome is said to be still pending in Austria.

The communications between the Roman See and the Protestant States of Germany have assumed the form of edicts on the part of the Pope, with respect to the creation, restoration, and general adjustment of dioceses, [*399] entitled "*Bullæ Circumscriptionis*;" and on the part of the State a *recognition of these Bulls in a domestic law or statute subsequently promulgated.

CCCXCIII.(d) To this adoption of the regulations of Rome by the *placet* of the territorial power, German jurists are careful not to ascribe that binding power, for the future, which is inherent in a Treaty or Concordat. The acts of the State, which clothe these Papal Edicts with the character of municipal law emphatically recite that their force, as such, is derived from the Sovereign who promulgates them; and the Bulls relating to Prussia and Hanover recite that they have been framed with the acquiescence and consent of the Sovereign.

CCCXCIV. The *Bulla circumscriptionis* for Prussia is known by the title "*De Salute*,"(e) the words with which the instrument begins; it was accompanied by a letter beginning "*Dilecti filii*." In both docu-

(c) Eichhorn, *Kirchenrecht*, I. Band, B. ii. Abschn. ii. c. 1. Phillipps, *Kirchenrecht*, 3, 523, for the status of the Roman Catholic Church, generally, in Germany.

(d) Vide Eichhorn, *supra*. Klüber, *Oeffent. Recht des Deutschen Bundes*, Th. 2, s. 420. Phillipps, 3, 677, 8-9, complains of this construction.

(e) The Bull is given at length in the Appendices to Eichhorn and Phillipps, and in the *Parl. Papers*. See below.

ments the approbation of the King of Prussia was recited. This Bull was sanctioned by a cabinet order of the King of Prussia. (f)

The Bulla circumscriptionis for Hanover bears date the 26th March, 1824, and begins, "*Imperio Romanorum Pontificium*;" *it recites that Pius VII. had considered the matter, and proceeds, "re [*400] propterea collatâ cum Serenissimo "*Georgis Quarto regnorum Magnæ Britanniae et Hiberniae unitorum necnon Hannoveræ Rege,*" &c. This Bull was ratified by a royal sanction of George IV., dated from Carlton House in England. (g)

CCCXCV. According to the Law of Hanover, (h) all Bulls and Briefs require the Royal Placet, unless they relate solely to spiritual matters, and if they do, they are to be brought under the supervision of the King. The Roman Catholic Bishops of Hanover take a very stringent oath of fidelity to the Crown. (i)

(f) "Berlin, August 23, 1821.

"Whereas, the Papal Bull submitted to me by you, which begins with the words '*De salute animarum,*' and is dated Rome, the 16th of July of this year (xvii. Cal. Aug.,) agrees in its essential contents with that arrangement which was entered into on the 25th of March of this year, respecting the establishment, endowment, and limits of the archbishoprics and Bishoprics of the Catholic Church in the State, and of all subjects having reference thereto, and which was already sanctioned by me on the 9th of June of this year, I will hereby give, on your proposal—also to the essential contents of this Bull, namely, to what concerns the enactments respecting things having reference to the before-mentioned subjects—my royal approval and sanction, by virtue of which these enactments are to be observed as the binding statute of the Catholic Church of the State, by all those whom it concerns.

"This, my royal approval and sanction, I give in virtue of my sovereign rights, and without prejudice to these rights, as well as to all my subjects of the Evangelical Church of the State.

"Accordingly, this Bull is to be printed in the Collection of Laws, and the Ministry of Ecclesiastical Laws is to take care of its execution.

"(Signed) FREDERIC WILLIAM.

"To the State Chancellor, Prince von Hardenberg."

—Parl. Papers, 1851, p. 169.

(g) Parl. Papers, 1851, pp. 90–102. See Appendices to Eichhorn and Philipps for the Bull.

(h) Parl. Papers, 1851, p. 89.

(i) "Form of Oath of Allegiance to be taken by Roman Catholic Bishops in Hanover.

"I, N. N., Bishop of Hildesheim and Administrator of Osnabruch, swear &c., &c., on oath before the Almighty and All-knowing God, that after having been promoted to the dignity of Bishop of Hildesheim, and nominated Administrator of the Diocese of Osnabruch, I will be true, devoted, obedient, and subject to His Majesty Ernest Augustus, King of Hanover, Royal Prince of Great Britain and Ireland, Duke of Cumberland, Duke of Brunswick and Luneburg, &c., my most gracious King and Ruler of the land, and to his illustrious legal successors in the Government. I will promote, to the best of my power, in the practical circle allotted to me, what may advantage His Majesty and the common welfare (avoiding injury and disadvantage;) and truly and conscientiously attend to my episcopal office, and my episcopal administration. I will take pains to lead a worthy and irreproachable life, and most zealously will, above all, be anxious that Christian knowledge and true piety, joined with reverence towards the head of the State and love to the fatherland shall take deep root and blossom with the vigour in the ecclesiastics and laymen entrusted to my direction, and especially also in the growing youth. I will therefore not suffer or allow that priests or other ecclesiastics under my control shall teach or act in a contrary sense or spirit, or otherwise, by word or deed, lead astray, the fidelity of the subjects, and their loyalty to their King and fatherland; and should I get knowledge that anywhere, within or without my diocese,

[*401] *CCCXCVI. The relations of the Papal See with the Provinces of the Upper Rhine have been less easily arranged.

On the 24th of March, 1818,^(k) Wurtemberg, Baden, the two Hesses Mecklenburg, Nassau, Oldenburgh, the Grand Ducal and Ducal Houses of Saxe, Lubeck, Bremen, Frankfort, and Hamburg, put forth a Latin Declaration, which they subsequently denominated, "*Magna Charta Libertatis Ecclesiæ Catholicæ Romanæ*," founded upon the principles of the German Princes' Concordat of 1446, upon the resolutions of the Archbishops at Ems (die Emser Punktation,) and the Austrian constitution of the Church under Joseph II.

This declaration was resisted and replied to by the Pope, who subsequently, in August, 1821, promulgated a "*Bulla circumscriptionis Diœcesium Provinciæ Ecclesiarum superioris*," in which he recited that the Sovereigns of the territories above mentioned had sent ambassadors to Rome to arrange matters respecting the foundations and dotation of certain bishoprics; "*ast cum res omnes ecclesiasticæ, *de quibus* [*402] *actum fuit, conciliari minimè potuerint*;" His Holiness was therefore compelled to make ecclesiastical arrangements for the faithful in these countries, in the hope that the rulers of them would be brought to a better mind. This Bull begins, "*Provida solersque*."

The Sovereigns of the provinces replied by a *Kirchenpragmatik*," in which the former resolutions were embodied.

On the 11th April, 1827, the Pope promulgated a "*Bulla erectionis Diœcesium Provinciæ Ecclesiasticæ Superioris Rheni*," beginning "*Ad dominici gregis custodiam*."^(l)

In this instrument the Sovereigns of the respective territories were allowed the power of objecting to any one of the candidates for the episcopal and archiepiscopal sees; and a hope was expressed that they would be benevolent towards their Catholic subjects, who would be most loyal to them.

CCCXCVII. These Bulls were finally admitted by the respective Governments, it being declared "that nothing therein contained shall be construed or considered as interfering with the rights of the Sovereign, opposed to the laws and ordinances of the land, the archiepiscopal and

anything should be intended which could threaten with danger His Majesty the King, his dignity and rights, as well as the security, peace, and welfare of the State, I will make immediately a faithful report thereof. At the same time I declare herby that I thoroughly understand, and will cause to be understood, the oath which I have to tender to His Holiness the Pope, as head of the Catholic Church, before entering my office, and especially the clause in this oath which purports, '*Hæc omnia et singula et inviolabilius observabo, quo certior sum, nihil in illis contineri, quod juramento fidelitatis meæ erga Regem Hannoveriæ ejusque ad thronum successores debitæ adversari possit*;' that I do not consider myself in any other sense, by this said oath of consecration, bound to an act or omission of any kind which would be against my duty as a subject, and the oath of allegiance, devotion, and subjection which I have tendered to His Majesty, my most gracious King and Ruler of the land. All this I swear, vow, and declare, so help me God, and His holy Word."—Parl. Papers, 1851, p. 103.

(k) Phillipps, iii. 529.

(l) See Phillipps, Band iii. and Eichhorn, ii. App. for these Bulls; and Parl. Papers, 1851. "Further Correspondence," &c., p. 2, Hesse Cassel, Nassau, &c.

episcopal privileges, or the rights of the Evangelical Confession and Church.”(m)

Moreover, on the 30th January, 1830, the Governments of the States, to which these Bulls were applicable, promulgated “an ordinance relative to the exercise of the sovereign right of protection and superintendence over the Catholic Church.” It recited the Bulls, and proceeded, “Now that, in consequence of the agreement made (*getroffenen Abrede*) with the Roman Court, the episcopal sees and cathedral chapters of this Church province are entirely filled, and they have entered upon the exercise of the authorities connected *therewith, we are induced, in concurrence with the other Governments in the Upper Rhine [*403] Province, to publish and make known the following ordinances for the maintenance of our right of protection and superintendence over the Catholic Church in our dominions.”

Then follow thirty-nine Articles, in none of which the Roman See is mentioned, except in the fifth, which declares that all Roman Bulls and Briefs must receive the sanction of the Sovereign, and that Bulls which have received it are only binding so long as nothing contrary to them shall have been enacted by the State. That the sanction of the State is necessary not only for present but for former Papal ordinances, if it be intended to use them. Otherwise all reference to “foreign” authority is forbidden, and the “Metropolitan” is spoken of throughout as the ecclesiastical superior.

By Article 3.—“Every State exercises its inalienable sovereign right of protection and superintendence (*Majestätsrechte des Schutzes und der Oberaufsicht*) over the Church to its full extent.”

By Article 8.—“The Metropolitan constitution is re-established according to its original intention, and the exercise of the Metropolitan rights belonging to the Archbishop are under the united protection of the collective States.”

By Article 10.—“The Church disputes (*kirchliche Streitsachen*) of Catholics may in no case be carried out of the province, or before foreign judges; and therefore, in their respect, the necessary regulations will be made.”

By Article 15.—“No ecclesiastic can be elected Bishop who is not a German by birth and a citizen of the State in which the vacant episcopal see is situated, or of one of the States which have united to form such diocese.”

By Article 16.—“The Bishop elect is to apply to the Superior of the Church for information immediately after the election. Prior to consecration he is to take the oaths of fidelity and obedience in his quality of Bishop to the Sovereign of the country.”

By Article 17.—“After having received consecration, *the Bishop enters into full exercise of the rights and duties connected with the episcopacy, and the Governments will not suffer him to be impeded; on the contrary, they will effectually protect him.” [*404]

By Article 22.—“Taxes or rates, of whatever kind they may be, or

(m) Phillipps, iii. 532. Parl. Papers, 1851. “Further Correspondence,” &c., p. 3. NOVEMBER, 1855.—18

by whatever names they may be called, shall not be raised either by our own or by foreign ecclesiastical authorities."

By Article 33.—"No ecclesiastic can accept any dignities, pensions, decorations or titles from foreigners without the consent of his Sovereign."

By Article 34.—"Every ecclesiastic, before he receives the Church ordination, shall take the oath of fidelity to the Head of the State, and swear canonical obedience to the Bishop."

By Article 36.—"The ecclesiastics as well as the laity have the right of appeal to the State authorities, whenever an abuse of the ecclesiastical authorities takes place against them."

CCCXCVIII. The object of these regulations is manifestly to form a national Catholic Church.

The Pope remonstrated in a letter directed to the Archbishops of the provinces, beginning "*Pervenerat non ita*," complaining of ecclesiastical assent having been given to many of the provisions, and of a breach of the alleged convention between the Princes and the Roman See. The Bishops of the Upper Rhine have lately demanded a repeal of many secular provisions concerning the Church, and have claimed a right of free communication with Rome.⁽ⁿ⁾

CCCXCIX. Saxony presents the solitary instance of a Roman Catholic Sovereign over a Lutheran people—a state of things exactly reversed in Belgium.

[*405] *CCCC. In the fifteenth century, the Prince and the people of Saxony embraced the Evangelical Protestant Religion.^(o)

The provisions of the Treaty of Passau (1552,) of the Peace of Augsburg (1555,) and of the additional articles to the Treaty of Westphalia, were strictly applied to Saxony.

During the existence of the Imperial Diet, Saxony was President of the "*Corpus Evangelicorum*," the politically-recognised part of the Imperial Representation.

Upper Lusatia was acquired by the Electoral House of Saxony in 1635, at the Peace of Prague. In this province the Roman Catholic Religion prevailed, and the preservation of its rights was confirmed by the Elector.

Augustus the Strong acquired the Crown of Poland, and embraced the Roman Catholic Faith; but he secured to his country, by what is called "*the Reservation*" (*Reservalien*,) all its religious rights. Till 1697 the Roman Catholic Faith was only tolerated in Saxony.

By Article V. of the Treaty of Posen, and by mandate of the 16th of February, 1807, Roman Catholics and Evangelists were placed on an equality as to their religious worship, and as to their civil and political rights. But the relation of the Roman Catholic Church to the State, and its fixed government, were established by a law promulgated on the 19th of February, 1829.

(n) Philipps, Band iii. App. Parl. Papers, 1851. "*Further Correspondence*." Gazette de Hanau, 1851 (before June.)

(o) Parl. Papers, 1851, p. 223.

This law gave an organic construction to the Roman Catholic Church without any Concordat from the See of Rome.

In the old hereditary dominions there is an Apostolic Vicariate, to which office the Pope appoints one of the native clergy proposed to him by the King. The Apostolic Vicar takes an oath of allegiance to the King.

In Upper Lusatia the episcopal duties are performed by the Dean at Bredissin or Bautzen; the Dean is chosen by the Chapter and confirmed by the King. (*p*)

*There are no bishoprics in Saxony. When the Pope makes the Apostolic Vicar or the Dean a Bishop, it is *in partibus infidelium*. [*406]

The Placet (*q*) is required for every notification of the Pope or the Apostolic Vicar. The right of the Placet is incident to the sovereignty of the State, whether the King be Roman Catholic or not.

All ecclesiastical authorities are subject to the Department of Public Instruction (*das Ministerium der Cultur*.) Complaints of the abuse of the ecclesiastical power are brought before this department and before the Cabinet.

CCCCI. In Denmark (*r*) no communication since the Reformation has taken place with Rome. At Copenhagen there is a Roman Catholic chapel, under the protection of the Austrian Government, who are bound by treaty to tolerate a Protestant chapel at Vienna.

In Sweden and Norway (*s*) there is no arrangement of the nature of a Concordat subsisting between the Crown and Rome. From the time of Charles IX. to 1780, no Roman Catholic priest could legally officiate in the kingdom. The Pope obtained toleration for the Roman Catholics when Gustavus III. visited Rome in 1780.

No Papal Bull has ever been published in these dominions.

The arrangements entered into between Wurtemberg and the Papal See are the Bulls already mentioned of *Provida solersque* (August 16, 1821,) *Ad dominici gregis custodiam* (April 11, 1827.)

By a Royal Ordinance of 30th January, 1830, all Papal Bulls and Briefs must obtain the royal sanction, and no former Bulls can be put in force without it.

CCCCII. There is no Concordat existing between the *Swiss Confederation, as such, and the Roman See. (*t*) The Federal [*407] Government does not interfere in any way respecting the appointment of Bishops, or the promulgation of Bulls or other instruments from Rome. These matters are regulated by the authorities of the respective Cantons, and the arrangements relating to them are of various kinds. But although

(*p*) The Apostolic Vicar and the Dean are generally united in the same person, who is made a Bishop *in partibus*. He must take the oath of obedience to the Constitution of 1631.

(*q*) The exercise of the royal supremacy (*jus circa sacra*) over the Church is settled by the Regulations of 1837 and 1845, though the latter have not yet been promulgated.

(*r*) Parl. Papers, 1851, p. 81.

(*s*) *Ib.*, p. 307.

(*t*) Parl. Papers, 1851, p. 321.

no uniform rule(*u*) upon these matters prevails throughout Switzerland, the principle of requiring the sanction of the domestic authority in all cases where the See of Rome directly addresses itself to the subject of that authority, appears to be steadily adhered to.

CCCCIII. The Bishops in the Roman Catholic Cantons are appointed either directly by the Cantonal authorities, or subject to their approbation, and the publication of Papal Bulls and instruments is not permitted without the previous *placet* of the Government.

CCCCIV. There was a formal Convention(*x*) entered into between the Pope and the Canton of St. Gall, relative to the re-organization of the Bishopric of St. Gall, in 1845(*y*) This appears to be the only instance of any kind of Concordat between the Roman See and any of the Swiss Cantons. After this Convention a Bull was issued in 1847(*z*) and was sanctioned by the *Placet* of the Landamman and Executive Council of [408] the Canton of St. Gall in an act which carefully guarded *the sovereign right which belongs to the State in reference to the Catholic body."

In 1824(*a*) on the occasion of the establishment of the Double Episcopal See of Coire and Gall, without notice given to the State, or its consent being obtained, the Great Council passed a resolution refusing to recognize the negotiation sequestrating the temporalities of the Bishopric of Coire, and declaring to the Prince Bishop of Coire that the State considered "Every Bishop of Coire, both according to legal principles and special agreements with the Episcopal See, and the existing laws, to be in every temporal respect, as much dependent upon the same as other Christian Sovereigns considered their Bishops to be."

In 1834(*b*) the President and Great Council of the Canton of Lucerne put forth a law subjecting to the *Placet* of the State "Roman Bulls, Briefs, and other enactments."

In 1850, the Great Council of the Canton of the Grisons promulgated an Ordinance declaring, among other things, "That all regulations and enactments of ecclesiastical authorities of both religions, intended to reach the people, directly or indirectly, shall be submitted to the inspection of the Executive, prior to their being promulgated, communicated, executed, or applied."(*c*) This law is enforced by the penalties of fine and imprisonment.

CCCCV. The reorganization of the Bishopric of Basle(*d*) 1828—1830, was effected upon the principle of "Episcopal "Concordats" and "Papal

(*u*) Uri, Schwyz, Unterwalden. The Valais appear to be the only exception; in them Bulls, &c., are published without the *Placet* of the Government.

(*x*) Parl. Papers, "Further Correspondence," p. 51.

(*y*) See p. 61, ib. for the Bull relative to this bishopric, beginning "*Instabilis rerum humanarum memoria.*"

(*z*) Ib. pp. 72-3. The Act of the State of St. Gall. "Der Eingangs erwähnten Bulle, welche anfängt '*Instabilis*,' &c., wird an mit das obrigkeitliche *Placet* ertheilt," &c.

"Genannte Bulle soll sowohl in ihrem Urtexte, als in der von uns anerkannten deutschen Uebersetzung, in die Sammlung der Gesetze und Beschlüsse aufgenommen werden."

(*a*) Parl. Papers, 1851, "Further Correspondence," p. 74.

(*b*) Ib. p. 15.

(*c*) Ib. p. 77.

(*d*) Ib. pp. 78, 153.

See especially the Historical Memoir (Vorrede,) p. 78; translated, p. 153.

demarcation Bulls," recognized by special "State sanctions" of the respective Governments of the Cantons.^(e) One of the most curious instances of the jealousy with which the Swiss have regarded whatever was *supposed to be an ecclesiastical encroachment upon the civil power, is to be found in the address of the old Patrician Government of Fribourg to the Bishop of Fribourg, complaining of the publication by him of directions concerning the observance of Lent, without the knowledge or consent of the Government. The language in which the Fribourg Government enunciates the principle on which it relies is remarkable: "Il est dans la nature des choses, il est de l'essence de la souveraineté, et l'ordre public réclame impérieusement que tout acte, quelqu'en soit la source ou le but, ne puisse être publié dans un Etat sans l'agrément de l'autorité souveraine. Cette règle, si intimement liée au bien de la société, a été observée, votre Grandeur ne saurait l'ignorer, dans les Etats les plus attachés à la religion Catholique, et qui par conséquent respectaient le plus les droits de l'Eglise." [*409]

*CHAPTER IX.

[*410]

THE INTERNATIONAL RELATIONS OF THE PAPACY WITH STATES IN WHICH A BRANCH OF THE CATHOLIC CHURCH, NOT IN COMMUNICATION WITH ROME, IS ESTABLISHED.

CCCCVI. WE have now to consider the relations of the Papacy with those States in which a branch of the Catholic Church is established.^(a) These Catholic Churches are distinguished from Roman Catholic Churches by not acknowledging the Pope as their spiritual chief, and from merely Protestant Churches by their Episcopate; or, as it is clearly said by Portalis, "*Toutes les communions Protestantes s'accordent sur certains principes. Elles n'admettent aucune hiérarchie entre les pasteurs.*"^(b) The established Catholic Churches, not in communion with Rome, are two:—

1. *The Greek Church.*

2. *The English Church.*

The English Church in the Colonies, the Episcopalian Church of Scotland, and the North American Church are not established, in the sense of being endowed by the State.

CCCCVII. It does not lie within the province of this work to dwell upon the history of that great schism between the Greek and Latin Churches which made the first external rent in the seamless robe of the Church.

(e) Ib. p. 228.

(a) Parl. Papers, 1819, p. 254. Ibid. 1851, p. 173.

(b) Rapport du Portalis sur les Articles Organiques des Cultes Protestants. Discours, &c., sur le Concordat de 1801, par le Vicomte Portalis (Paris: 1845,) p. 105.

The Greek branch of the Catholic Church is said to number eighty millions of worshippers. It is established in *the countries subject to the Porte, Russia and Greece*. In all these countries the Roman See fosters a separate communion.

[*411] *CCCCVIII. Russia has no Concordat with the Pope, but certain articles were agreed upon in 1847, between them, which regulate the appointment of Roman Catholic prelates. They are nominated by the Emperor, who communicates his choice confidentially to the Pope, who, if he entertain no objection to it, canonically institutes the imperial nominee. But all direct communication between the Pope and the Roman clergy in Russia is interdicted; the only channels through which it is allowed to be carried on being the Russian mission at Rome, and the Department of Foreign Affairs at St. Petersburg. This department and that of Foreign Worship (which is under the jurisdiction of the Minister of the Interior,) examine every instrument emanating from Rome before it can be delivered to the clergy of that see.

The present practice of the Russian Government is to decline the reception of any Nuncios or Papal Legates at St. Petersburg, except such as are sent on special missions.

CCCCIX. No Concordat, or arrangement in any way equivalent or analogous to it, subsists between the Sublime Porte and Rome. The Roman Vicar Apostolic resident at Constantinople is not recognised by the Turkish Government.

The Roman Bishops are either appointed or confirmed by the Pope, and Papal instruments are transmitted to them from Rome, either directly or through the unrecognised Vicar Apostolic; But no Papal Brief can be legally enforced, and the Pope appears to connive at the exercise of spiritual authority by the Roman communities in Turkey, but to reserve to himself the right of interference.^(c)

CCCCX. The relations of the National Church of Greece with the Patriarchate of Constantinople will be mentioned in the next chapter.

[*412] *Between the kingdom of Greece and the See of Rome there exists no Concordat, or equivalent arrangements.

The Latin population appears to be diminishing, though in some of the Islands inhabited by the descendants of the old Venetian and French settlers, the Latin Bishops exist in a number at present disproportioned to their congregation.

The Pope directly appoints Bishops of the Latin Church, who apply to the Minister of State for their exequatur, which, it appears, has never been refused.

The Pope does not appear to be compelled to nominate natives to the Latin sees, though, as a matter of fact, the existing Latin Bishops are natives.

The reception and publication of Papal instruments is not forbidden

(c) "The appointment of Bishops," writes Sir Stratford Canning, "is at once a matter of conflicting pretensions, and of mutual though tacit compromise between the Court of Rome and the several Roman Catholic communities."—Parl. Papers, 1851, p. 323.

by any law, but; as a matter of fact, communications from Rome are carried on through the medium of a private correspondence.

The Latin Church founds its rights on long custom and enjoyment guaranteed at the Revolution, which guarantee was recognised by the National Assembly in 1843, at the period of the formation of the Constitution.

The fact of the Monarch of Greece professing the religion of the Latin Church, has, of course, facilitated the civil status of that Church and the intercourse with Rome.

The Bishops are required to take the oath of allegiance to the King, and of fidelity to the Constitution.

CCCCXI. The history of the relations of the Roman See with England, since the Reformation, is without parallel in the annals of the world.

Before the Reformation, these relations of England with Rome were not unlike those which subsisted between the Papacy and other considerable independent Kingdoms.

In the history of no kingdom is the independence of the national Church written with a firmer character than in that of England, in the statutes of the realm, the decisions of judicial tribunals, and the debates of Parliament.

The Constitutions of Clarendon, in Henry II.'s reign (A. D. 1164,) though directly aimed at the repression of the *inordinate claims and privileges of the National Church, were, no doubt, indirectly [*413] "calculated," as Hume observes, "to establish the independency of England on the Papacy;" and therefore, when the King sought Pope Alexander's ratification of them, that Pontiff annulled and rejected all but six out of the sixteen memorable articles. The resistance of Becket, and still more, the general feeling excited by the wicked and impolitic murder of that prelate, procured the practical abrogation of the articles objected to, by the enactments of Edward I.(d) and III., of Richard II., of Henry IV. and V., and of Edward IV.

CCCCXII. In the severe penalties attached to the statutes of Provisors and Præmunire may be read the steady determination of the English people to maintain an independent national Church, and to resist the ultramontane doctrines, which had taken root in other countries.

The Statute of Provisors (25 Ed. III. st. vi. A. D. 1350) recites that "the Holy Church of England was founded in the estate of prelacy within the realm of England" by the King and nobles of England, and forbids the prevalent abuses of the Pope's bestowing benefices upon aliens, "benefices of England which be of the advowry of the people of Holy Church," the reservation of first fruits to the Pope, and the provision or reservation of benefices to Rome. By 38 Ed. III. st. 11, c. 1, (A. D. 1363,) persons receiving citations from Rome in Courts pertaining to the King, &c., are liable to the penalty of 25 Ed. III.(e)

(d) See the provisions of the Parliament at Carlisle, A. D. 1307.

(e) 37 Ed. III. st. 1, c. 1, A. D. 1353.

"Præmun ire for suing in a foreign realm, or impeaching of judgment given."

The Statute (A. D. 1392) 16 Richard II. c. 8, renders the procuring of Bulls from Rome liable to Præmunire, and it [*414] recites a variety of Papal aggressions upon the privileges of the Crown; among other matters, as to the translation of Bishops out of the realm, or from one bishopric to another within the realm, and the carrying of treasure out of the realm, "and so the realm, destitute as well of counsel as of substance, to the final destruction of the said realm, and so the Crown of England, which hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God in all things touching the regality (*la regalie*) of the same Crown, and to none other, should be submitted to the Pope, and the laws and statutes of the realm by him defeated and avoided at his will, in perpetual destruction of the sovereignty of the kingdom of the King and Lord, his [*415] Crown, his royalty, and of all his realm, which God defend."

This statute before the Reformation, and the subsequent enactment of 24 Henry VIII. c. 12, and the famous case of Cawdry, (*f*) may be said to contain the whole Constitutional Law of England upon the subject of the usurpation of the Papal See upon the liberties of the national Church, and in regard to the authority and privilege of the English Crown.

CCCCXIII. It would be difficult to conceive a clearer or more digni-

Præmunire, so called from the words of the writ:—"Rex vice comiti," &c., "præmunire facias præfectum A. B. quod tunc sit coram nobis."

38 Ed. III. st. 2, A. D. 1363. Against Provisors.

There are various statutes of Richard II. against giving benefices to aliens, or allowing aliens to purchase or convey benefices, viz.:—

13 Rich. II. st. 2, c. 2, is a confirmation of the statute of 25 Ed. III. st. vi. See, too, c. 3.

16 Rich. II. c. 5, A. D. 1392, made it Præmunire to purchase Bulls or other instruments from Rome.

This statute was called by the Pope *execrabile statutum*, and the passing of it *fædum et turpe facinus*.—*Burn's Ecclesiastical Law*, 2, 36. (Ed. Phillimore.) See also, generally, as to Papal authority—

2 Hen. IV. c. 3, A. D. 1400.

3 Hen. V. st. 2, c. 4, A. D. 1415.

32 Hen. VI. c. 1, (Ireland,) A. D. 1454. All Statutes against Provisions in England and Ireland to be kept in force.

7 Ed. IV. c. 2, (Ireland,) A. D. 1467. Against Bulls from Rome.

2 Ed. IV. c. 3.

10 Hen. VIII. c. 5. An Act against Provisors to Rome.

23 Hen. VIII. c. 20. An Act restraining payment of Annates to the See of Rome, A. D. 1531.

24 Hen. VIII. c. 12, A. D. 1532. The great Statute forbidding Appeals to Rome, under pain of Præmunire.

25 Hen. VIII. c. 19, A. D. 1533. Act of the Submission of the Clergy and the Restraint of Appeals.

— c. 20. Act for Non-payment of First-fruits to the Bishop of Rome.

— c. 21. Concerning Peter-pence and Dispensations.

28 Hen. VIII. c. 13, (Ireland,) A. D. 1537. An Act against the Authority of the Bishop of Rome.

— c. 16, A. D. 1536. As to Dispensations and Licences heretofore obtained from the See of Rome.

— c. 19, (Ireland,) A. D. 1537. The Act of Faculties.

5 Eliz. c. 1, and 13 Eliz. c. 2, brought the maintaining the pre-eminence of the See of Rome under the penalties of the Statutes of Provisors and Præmunire.

(*f*) 5 Coke, 8.

fied exposition of the law upon this subject than is contained in the prefatory part of the statute of Henry VIII.

“Where by divers sundry old authentick histories and chronicles, it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and King, having the dignity and royal estate of the imperial crown of the same; unto whom a body politic, compact of all sorts and degrees of people, divided in terms, and by names of spirituality and temporality, been bounden and owen to bear next to God a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole, and entire power, pre-eminence, authority, prerogative and jurisdiction, to render and yield justice, and final determination to all manner of folk, resiants, or subjects within this his realm, in all causes, matters, debates and contentions, happening to occur, insurge, or begin within the limits thereof, without restraint or provocation to any foreign princes or potentates of the world; the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and shewed by that part of the said body politic, called the spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity and sufficiency of number, it hath been always thought, and is also at this *hour sufficient and meet [*416] of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain; for the due administration whereof, and to keep them from corruption and sinister affection, the King’s most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said Church, both with honour and possessions; and the laws temporal for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, was and yet is administered, adjudged and executed by sundry judges and ministers of the other part of the said body politic, called the temporality; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other.”

CCCCXIV. At the period of the Reformation, the national Church introduced an express denial of the authority of the Pope, henceforth called in all public acts and documents the Bishop of Rome, into her articles and canons, and an acknowledgment of the temporal supremacy of the Crown over the Ecclesiastical as well as the Civil State.

Henry VIII.(g) was excommunicated, and in the Bull his subjects were commanded to renounce their allegiance, and the nobles were ordered “sub ejusdem excommunicationis ac perditionis bonorum suorum

(g) *Damnatio et Excommunicatio Henrici VIII. Regis Angliæ, ejusque fautorum, &c.* (edita A. D. 1535 et 1538.) This is printed at length in the Appendix to the *Brutum Fulmen, or the Bull of Pope Pius V. concerning the Damnation, Excommunication, and Deposition of Queen Elizabeth*; and the *Bull of Pope Paul III. against Henry VIII.*, by Thomas [Barlow,] Lord Bishop of Lincoln. [London: 1681.]

pœnis," to unite with all Christian Princes in expelling Henry from England. Elizabeth(*h*) was excommunicated in pretty similar terms, but not until twelve years after her accession. In answer to a request from [*417] the Emperor and other Roman Catholic Princes *that she would allow the Roman Catholics places of worship, she replied that she would not allow them to keep up a distinct communion, alleging her reasons in these remarkable words, "for there was no new faith propagated in England: no religion set up but that which was commanded by our Saviour, practised by the primitive Church,⁽ⁱ⁾ and unanimously approved by the fathers of the best antiquity." (*h*) The Roman Catholics, both in England and Ireland, outwardly conformed to the services of the Church for about ten years.^(l)

Both this fact and the ground of Queen Elizabeth's refusal are remarkable, and not without their bearing, as considerations of International Law, upon the question of the recent Papal aggression in England.

CCCCXV. As the Jesuits pursued their machinations against Elizabeth, she had recourse, by way of defence, to the severest statutes against the Papal power, enacting that the attributing by act or speech any such authority or jurisdiction to the Bishop of Rome, as he had heretofore claimed, should be punishable with *Præmunire*.

CCCCXVI. In the year 1827, long after the Pope had been restored to the Vatican, in great measure through British money and British arms, this statute of Elizabeth was held by the law officers of the Crown to be still in force, and actually to prevent Mr. Canning (then Secretary for Foreign Affairs) from replying to a letter sent to him by the Pope announcing his succession to the Pontificate.^(m) From the reign of Elizabeth till the recent Act of Victoria, all legal channels of communication—we pass by the illegal exception of James II.'s *reign—[*418] between Great Britain and the See of Rome were closed,—a fact in history almost incredible when it is remembered that in Ireland alone there were many Roman Catholics.

CCCCXVII. (*n*) William III. introduced that barbarous code of persecuting laws against the Roman Catholics which disgraced the statute-book of this country, until the reign of George III.; which made Ireland, according to Mr. Burke's expression, "full of penalties and full of Papists;"^(o) and which has entirely failed in its object of eradicating Papacy, as the Inquisition had failed in destroying Protestantism.

Since the alterations which the law has undergone during the reign

(*h*) Accession, A. D. 1558; excommunication, A. D. 1570.

(*i*) The English Church has always held the doctrine of St. Cyprian, "Episcopatus unus est, cujus à singulis in solidum pars tenetur."—*De Unitate Eccles.* (London,) 641.

(*k*) Collier's *Eccles. Hist. of Great Britain*, vol. vi. pp. 263–4: vide ante, p. 290, n. (*h*)

(*l*) Collier's *Eccles. Hist.*, vol. vi. p. 264.

(*m*) Mr. Canning's speech on the Roman Catholic question, March 6, 1827.

(*n*) In Collier's *Church History*, vol. ix. p. 365, will be found Paul V.'s Brief to the Roman Catholics forbidding their going to the English service, or taking the oath of allegiance, A. D. 1606; and Cardinal Bellarmine's letter to the Archbishop.

(*o*) Tracts on the Popery Laws, Burke's Works, vol. ix.

George Blackwell, against the Oath of Allegiance, A. D. 1607, p. 365.

of the present Sovereign, it is questionable whether any civil penalty attaches to the acknowledgment of the Pope.

CCCCXVIII. The national intercourse with the See of Rome became lawful in 1848, by the statute of Victoria which enacts:—

“1. That notwithstanding anything contained in any Act or Acts now in force, it shall be lawful for Her Majesty, her heirs and successors, to establish and maintain diplomatic relations, and to hold diplomatic intercourse with the Sovereign of the Roman States.

“2. Provided always, and be it enacted, that it shall not be lawful for Her Majesty, her heirs or successors, to receive at the Court of London, as ambassador, envoy extraordinary, minister plenipotentiary, or other diplomatic agent, accredited by the Sovereign of the Roman States, any person who shall be in Holy Orders in the Church of Rome, or a Jesuit or member of any other Religious Order, Community, or Society of the Church of Rome, bound by monastic or religious vows.

*“3. Provided always, and be it enacted, that nothing herein [*419] contained shall repeal, weaken, or affect, or be construed to repeal, weaken, or affect, any laws or statutes, or any part of any laws or statutes, now in force for preserving and upholding the supremacy of our Lady the Queen, her heirs and successors, in all matters civil and ecclesiastical within this realm, and other Her Majesty's dominions, nor those laws, or parts of laws, now in force, which have for their object to control, regulate, and restrain the acts and conduct of Her Majesty's subjects, and to prohibit their communications with the Sovereigns of foreign States on the said matters, all which laws and statutes ought for ever to be maintained for the dignity of the Crown and the good of the subject.”(p)

This statute has not as yet been acted upon. It is said to have given offence to Rome by not speaking of the Pope in his spiritual character, and by the prohibition it contained with respect to the reception of any ecclesiastical ambassador from the Holy See.

The Pope, however, is unquestionably a temporal Sovereign, and in that capacity subject to temporal International Law. The Pope has temporal as well as ecclesiastical subjects of high rank, and the former might well discharge the duties of ambassador at a foreign Court, not in spiritual communion with Rome. If that foreign Court had reason to apprehend that the presence of an ecclesiastical ambassador would be likely, on whatever account, to disturb the peace of the country, it was surely justified both by the practice of comity as well as by strict law in refusing to receive an accredited minister of that character.

It is much lamented that Great Britain did not endeavour to obtain the reception of an English ambassador at Rome, soon after the passing of the statute above mentioned. The tempest of 1851, would have been probably averted, if the *Pope had been rightly and fairly informed of the state both of the law, and of the religious feeling [*420] in this country.

CCCCXIX. It is necessary to preface our observations on the promul-

gation in England of the Papal instrument in 1850, by some notice of the relations which have previously subsisted between the Roman Catholics in these realms and the See of Rome, since the epoch of the Reformation.

Dr. Watson, (g) Bishop of Lincoln, in Queen Mary's time, the last survivor of the prelates expelled by Queen Elizabeth, died in 1584. The Pope did not then attempt—though urged to do so at Rome—the establishment of a Roman Catholic Episcopacy in England. In 1589, an Archipresbyter was sent here under the authority of a Brief from Gregory XIII., a Mr. Blackwell was instituted to the office in which he was confirmed by a Brief of Clement VIII. in 1599. Rome governed the Roman Catholics through these Archipresbyters till about 1623; then the visit of Prince Charles (afterwards Charles I.) to Spain, his subsequent marriage with the French Princess Henrietta Maria, and the consequent necessity of a Papal dispensation, produced a relaxation, if not of the law itself in England, of the severity of its administration against Rome.

In 1622, a Roman Catholic Bishop of Chalcedon, that is *in partibus*, appears for the first time to have been sent to England by virtue of a Papal Bull. Two things are remarkable in this instrument:—

1. That it is expressly provided that no prejudice should arise from it to the Patriarch of Constantinople, to whom the Church of Chalcedon was subject.

2. That no allusion to England is to be found in it.

[*421] *So carefully was both the public law of the Church, which is itself of an international character, and the law which regulates the intercourse of independent nations, observed in this instance.

Subsequently, a Vicar Apostolic was sent from Rome to England. (r) This Vicar, though also a Bishop, was not, in the canonical sense, Ordinary in the place over which he presided; therefore the Roman Catholics remained under the immediate authority of the See of Rome. In James II.'s time, the number of Vicars Apostolic was increased to four, and so it remained till the year 1840. There were afterwards eight Vicars, with Bishops *in partibus* as coadjutors.

Under this system a regular Roman Catholic Hierarchy was not established, and it would seem that the Canon Law was imperfectly, if at all, applicable to that status of the Roman Catholics.

In Ireland the Roman Catholic Church has for many years been on a different footing, namely, it has been governed by Ordinaries and not by Vicars Apostolic.

In the British Colonies (s) the Roman Catholic Church is partly

(g) The Letters Apostolic, by Dr. Twiss, contain a great amount of information on this subject. See c. v. p. 114. In the Appendix will be found the Bull of Pius IX., and various instruments of his predecessors affecting the Roman Catholics in England.

See, too, Butler's Historical Memoirs of the Roman Catholics, and Dodd's (Roman Catholic) History.

(r) Brief of Benedict XIV., in 1753, beginning, "Apostolicum Ministerium," Bullarium, t. iv. p. 59.

(s) I have not entered into a discussion of the controversy about precedence between the Anglican and the Roman Hierarchy.

endowed and established, as in Canada, and everywhere tolerated, in whatever form it may chance to assume.

CCCCXX. It will be obvious from this necessarily brief sketch of the status of the Roman Catholics in England since the Reformation, that the ill-advised instrument which Pius IX. sent to these shores in 1851, was well calculated to excite the national feeling to the utmost verge of hostility against the Roman Catholics, and to resuscitate the expiring embers of religious animosity.

Not only was the customary law, as acknowledged and expounded by the greatest jurists and canonists of Rome, in the promulgation of decrees without the *Placet* or *Exequatur* of the State, violated, but the additional injury was done *of proclaiming to the subjects of that State, that the Church established in it was deficient in that indispensable and distinguishing mark of Catholicity which the Constitution had declared it to possess. [*422]

Upon this principle the infraction of the law by the late Papal Bull would have been, so far as the State alone is concerned, less, if it had been confined to Scotland, where there is no established Episcopacy, and still less in the United States of North America, where there is no established Church at all; though in both it would have been a clear offence against International Ecclesiastical Law as not having the *Exequatur* or *Placet* of the Sovereign.

1. The very title of the Bull, "*Papæ IX. Literæ Apostolicæ quibus Hierarchia Episcopalis in Angliâ restituitur*," conveyed an insult to the branch of the Catholic Church established in England.

A country which has retained as a cardinal point of its constitution the primitive episcopal government of the Catholic Church, has a right to treat the Papal appointment of a foreign Episcopate, unauthorized by the State, as a grave infraction of International Law—far graver than it would have been if no such national branch of the Catholic Church had been established in the State. Thus the manifesto, in March 29, 1851, of the two Archbishops and twenty Bishops of the English Church set forth "the undoubted identity of the Church before and after the Reformation," and that at the Reformation the English Church rejected certain corruptions and established "one uniform ritual," but "without in any degree severing her connexion with the ancient Catholic Church." (t) In Pius IX.'s Apostolic Letters, not only were Bishops created by titles derived from places in the Queen's dominions, thereby forestalling the prerogative of the Crown as to the future creation of Anglican Bishops, but, in one instance, that of St. David's the title of an existing *Anglican See was conferred by the Pope upon one [*423] of the Roman Bishops.

2. The language of the instrument, (u) treating England as if it had

(t) The Guardian, April 2, 1851.

(u) "Itaque post rem universam à nobis etiam accuratâ consideratione perpensam, *motu proprio*, certâ scientiâ, ac de plenitudine Apostolicæ nostræ potestatis constituimus, atque decernimus in regno Angliæ *refloreat juxta communes Ecclesiæ Regulas* Hierarchia ordinariorum Episcoporum qui à sedibus nuncupantur quas hic hisce ipsis nostris Literis in singulis Apostolicorum Vicariatuum Districtibus constituimus."

been a territory of the Sovereign of the Roman States, parcelling out the kingdom into districts, “*motu proprio*,” “*plenitudine Apostolicæ nostræ potestatis*,” without the faintest allusion to any other authority, was another aggravation of the offence, as were also—

3. The undeniable fact that the act being done “*Rege inconsulto*,” was done contrary to Canon no less than to International Law.

4. The proclamation of the Bull in the metropolis of the kingdom, without any *Placet* or *Exequatur* from the Sovereign.

Lastly, the Pope could not allege, by way of defence or palliation, the impossibility of conferring with the Sovereign of Great Britain, before he did an act without precedent in Ecclesiastical or International Law, because the recent statute above mentioned afforded means of international communication between the two Courts.

CCCCXXI. It is not within the scope of this work to travel into any political or ecclesiastical questions growing out of this wrongful and illegal act; but no impartial writer upon International Law could pass it by without adverting to the censure which that law inflicts upon it.

It is true that the publication of these Letters Apostolic raised a ferment in the minds of the English people, greatly resembling that which disgraced this country in the reign of Charles II., under the auspices of Titus Oates.

The result of many stormy debates in Parliament was the following statute, passed in the fourteenth year of the reign of Queen Victoria :^(x)—

[*424] **“Whereas divers of Her Majesty’s Roman Catholic subjects have assumed to themselves the title of Archbishops and Bishops of a pretended province, and of pretended sees or dioceses, within the United Kingdom, under colour of an alleged authority given to them for that purpose by certain Briefs, Rescripts, or Letters Apostolical from the See of Rome, and particularly by a certain Brief, Rescript, or Letters Apostolical purporting to have been given at Rome on the twenty-ninth of September, one thousand eight hundred and fifty : and whereas by the Act of the tenth year of King George the Fourth, chapter seven, after reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof and likewise the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, were by the respective acts of union of England and Scotland, and of Great Britain and Ireland, established permanently and inviolably, and that the right and title of Archbishops to their respective provinces, of Bishops to their sees, and of Deans to their deaneries, as well in England as in Ireland, had been settled and established by law, it was enacted, that if any person after the commencement of that Act, other than the person thereunto authorized by law, should assume or use the name, style, or title of Archbishop of any province, Bishop of any bishopric, or Dean of any deanery, in England or Ireland, he should for every such offence forfeit and pay the sum of one hundred pounds : And whereas it may be doubted whether the recited*

(x) 14 & 15 Vict. cap. lx., An Act to prevent the Assumption of certain Ecclesiastical Titles in respect of Places in the United Kingdom (1st August, 1851.)

enactment extends to the assumption of the title of Archbishop or Bishop of a pretended province or diocese, or Archbishop or Bishop of a city, place, or territory, or Dean of any pretended deanery in England or Ireland, not being the see, province, or diocese of any Archbishop or Bishop or deanery of any Dean recognized by law; but the attempt *to establish, under colour of authority from the See of Rome or otherwise, such pretended sees, provinces, dioceses, or deaneries, is illegal and void: And whereas it is expedient to prohibit the assumption of such titles in respect of any places within the United Kingdom: be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same that—

“I. All such Briefs, Rescripts, or Letters Apostolical, and all and every the jurisdiction, authority, pre-eminence, or title conferred or pretended to be conferred thereby, are and shall be and be deemed unlawful and void.

“II. And be it enacted, that if, after the passing of this act, any person shall obtain, or cause to be procured from the Bishop or See of Rome, or shall publish or put in use within any part of the United Kingdom, any such Bull, Brief, Rescript, or Letters Apostolical, or any other instrument or writing, for the purpose of constituting such Archbishops or Bishops of such pretended provinces, sees, or dioceses within the United Kingdom, or if any person, other than a person thereunto authorised by law in respect of an archbishopric, bishopric, or deanery of the United Church of England and Ireland, assume or use the name, style, or title of Archbishop, Bishop, or Dean of any city, town, or place, or of any territory or district, (under any designation or description whatsoever,) in the United Kingdom, whether such city, town, or place, or such territory or district, be or be not the see of the province, or co-extensive with the province, of any Archbishop, or the see or the diocese, or co-extensive with the diocese, of any Bishop, or the seat or place of the Church of any Dean, or co-extensive with any deanery, of the said United Church, the person so offending shall for every such offence forfeit and pay the sum of one hundred pounds, to be recovered as penalties imposed by the recited Act may be *recovered under the provisions thereof, or by action of debt at the suit of any person in one of Her Majesty's Superior Courts of Law, with the consent of Her Majesty's Attorney-General in England and Ireland, or Her Majesty's Advocate in Scotland, as the case may be.”

The policy of Queen Elizabeth was certainly bolder and perhaps wiser: when in her time the Pope sent an uninvited Legate to England, she took good care that he should not set his foot upon the shore of her territory, and if he had done so, she would certainly have sent him back to Rome.

CCCCXXII. The practice of Rome since the reign of Queen Elizabeth to appoint Roman Catholic Bishops *in partibus*, did not infringe directly the principle of territorial authority incident to Sovereigns or prelates of the country. The conduct of Great Britain with respect to the consecra-

tion of Bishops for the United States of North America was in harmony with this principle, and it must also be remembered that there was no established Church in that country, and that there is no trace in the English Statute(y) of the assumption of authority over the subjects of the United States. The conduct of Great Britain with respect to the establishment of the Anglican Bishopric at Jerusalem, can only be defended, as a question of International Law, upon the ground of the permission of the Sultan, and as a question of Canonical Law upon the permission of the Greek ecclesiastical authorities.

The statute founding that Bishopric was accompanied by a Letter Commendatory from the Archbishop of Canterbury "to the Right Reverend our Brothers in Christ, the Prelates and Bishops of the Ancient and Apostolic Churches in Syria and the countries adjacent;" and also by an explanatory statement, published by authority, in which it was declared that the new Bishop's "spiritual authority will extend over the English clergy and congregations, and over those who may join his [427] Church, and *place themselves under his episcopal authority in Palestine, and for the present, in the rest of Syria, in Chaldea, Egypt, and Abyssinia: such jurisdiction being exercised as nearly as may be, according to the laws, canons, and customs of the Church of England; the Bishop having power to frame, with the consent of the Metropolitan, particular rules and orders for the peculiar wants of his people. His chief missionary care will be directed to the conversion of the Jews, to their protection, and to their useful employment.

"He will establish and maintain, as far as in him lies, relations of Christian charity with other Churches represented at Jerusalem, and in particular with the Orthodox Greek Church; taking special care to convince them that the Church of England does not wish to disturb, or divide, or interfere with them; but that she is ready, in the spirit of Christian love, to render them such offices of friendship as they may be willing to receive."

Lord Aberdeen, who was consulted at the time of the institution of the bishopric, has recently declared in a letter, which has been published, that no interference was intended with the authority of the Greek Church.(z)

Considered apart from these limitations, the terms of the English statute,(a) under which this Bishopric was founded, are so extensive, as to be, however unintentionally, indefensible, upon the strict principles of International Law, Ecclesiastical as well as Civil.

(y) 26 George III., c. lxxxiv.

(z) Thomassinus has a chapter on the difficulties arising "circa ordinationes Episcoporum, vel plurium in unâ urbe," &c.—*Vetus et Nova Eccles. Discipl.*, pt. i. l. 1, c. xxix. S. vii. refers to the case of Venice, in which there were Greek Bishops for the Greek people; so in Cyprus and Rhodes: "Duo quippe in uno populo erant populi duæ urbe in unâ urbes quoties duos assignari Episcopos indultum est." The second Bishop should be confined to those of his own country and language, and act with the permission of the first.

(a) 5 Victoria, c. vi. s. 1.

*CHAPTER X.

[*428]

THE ELECTORS, MINISTERS, AND COURTS OF THE POPE, CONSIDERED IN
THEIR RELATION TO FOREIGN STATES.

CCCCXXIII. THE ambition of the Emperors of Germany, which at one period, as we have seen, claimed the absolute power of nominating the Pope, produced a reaction both in favour of a free election to the spiritual throne, and in favour of the independence of the temporal principality; for it became evident to Catholic Sovereigns that the Sovereign who nominated the supreme Pontiff would indirectly govern the whole of Christendom.(a)

At all times, indeed, the rule and manner of succession to that throne, which claims, without reference to territorial limits, a spiritual allegiance, theoretically from all Christians, practically from all co-religionists, of whatever country they may be subjects, must be a question of grave general international importance. But at no time, perhaps, can this be more truly predicated than at the present, not merely because most of the questions which in these days agitate nations, including the great war which is now afflicting Europe, have religion for their object or their pretext, but also because the difficult problem which the union of a temporal sovereignty with an universal spiritual dominion presents has never been more difficult or more necessary to solve. Of this problem, a living Italian (one of the few statesmen whom the recent throes of that unhappy country has produced) has well said, that, from its very nature, irrespective of external *circumstances, involves considerations which are both grave and universally interesting, both political and in- [*429]
ternational.(b)

CCCCXXIV. We must not, therefore, pass by wholly without notice the following considerations:—

1. What qualifications render a person eligible to be elected Pope?
2. Who are the electors and the ministers of the Pope?
3. What is the mode and law of such election?
4. May the Pope be deposed for any offence, and by whom?

CCCCXXV. (1.) According to rule and usage, no one is eligible, and no one is elected to be Pope, except a Cardinal;(c) but according to the Canon Law, the election of another person,(d) even, it is said, of a layman,(e) would not be null. So that Maximilian's(f) expectations were not without the pale of possible gratification. But the Throne of Rome may not be filled, as other thrones are, by a female. One must be a Protestant, says the French canonist, who has been already cited, or be

(a) Portalis, *Introd.* v. vi.

(b) Farini, *Lo Stato Romano*, vol. iv. Lettera XV. a G. Gladstone. "Nè ciò dipende tanto della natura dei Governi che prevalgono in Europa quanto *dalla natura stessa* del problema, il quale è implicato nelle più gravi ed universale questioni religiose, *internazionale*, e politiche." Vide post, Lettera XVII.

(c) D. De Maillane. ii. 551. "Pape."

(d) Can. oportebat et seq. dist. 79.

(e) Glos. in cap. si quis pecunia eod. verb. non Apostolicus.

(f) Vide ante, p. 342, n. (y).

blinded by other fanatical prejudices, "*pour croire à la fable de la Papesse Jeanne.*"(g)

As to the age of the Pope, it must not be less than that of the canonical age required for the Episcopate, namely, thirty years.(h) In the year 1770, it was remarked that of the successors of St. Peter three only had reached that elevation under the age of forty.

[*430] *CCCCXXVI.(i) The Electors of the Pope are the Cardinals. Who are the persons eligible for an order possessing such an important suffrage?

How are the members of this order elected or appointed?

What is their history?—what are the functions of this order?—are questions which immediately present themselves for solution.

CCCCXXVII. Originally every Church was governed by a Bishop, who was assisted by a synod or senate of the clergy, that is, of the priests and deacons in his diocese. Those of the clergy who were attached by institution to *certain cures of souls* to certain Churches, were at first designated Incardinati, as a name of distinction from the temporary and auxillary clergy not attached to any particular Church.

The name Incardinatus,(k) was afterwards exchanged for that of Cardinalis, and in early times every Church possessed its Cardinales, though probably the appellation was generally confined, as it was in France, to the clergy of the city, or suburbs of the city of the diocese, in fact to the chief advisers of the Bishop, and was not bestowed upon the rural clergy.

When the Church of Rome claimed pre-eminence over all other Churches it was an evident consequence that her Cardinals should be equally distinguished above all others.

It was the duty of the Roman Cardinals not only to govern the Churches of the metropolis of the world, but also to form the council of the chief pastor of that metropolis.

They were not Cardinals(l) merely because Incardinati to different [431] parishes in Rome, but also, and principally, because *these parishes constituted in their aggregate that Roman Church, which was the head, the centre, the hinge (cardo) of all the Churches of the world. These Cardinals, though but simple priests and deacons as their order, claimed jurisdiction over the inferior Bishops of the Roman See. Afterwards the Bishops of seven contiguous and suburban sees (*episcopi suburbicarii*) were added to the number of Cardinals.

The Pope was at first, like other Bishops, elected by the clergy and laity of the city, the choice being ratified by the Emperors; then, as we have seen, for a time the Emperor usurped the right of nomination, and finally the election was left to the regulations of the Roman See. In the Council held at Rome under Pope Nicolas II. (A. D. 1509), the principal authority in electing the Pope was conferred on the Cardinal

(g) D. De Maillane, ii. 551. "Pape."

(h) Ib. ii. 552. "Pape." Ib. i. 113. "Age." Ib. ii. "Episcopat."

(i) Pachmann, Lehrbuch des Kirchenrechts, s. 175-8. Vide post, Lord Palmerston's observations.

(k) Also Intitulatus.

(l) C. 1, Dist. xxii. C. 3, Dist. xxiv. C. 5, Dist. lxxi. C. 6, Dist. lxxiv. C. 13, Dist. lxi. C. 3-5, Dist. lxxix.

Bishops; Pope Alexander III., in the third Council of Lateran (A. D. 1179), excluded the people and the clergy from all share in the elections, and made equal the right of the Cardinal Bishops, Priests, and Deacons. Thus the election of the Pope fell into the hands of the College of Cardinals, with whom it has ever since remained.^(m)

CCCCXXVIII. The appointment of the Cardinals is made by the Pope.

To borrow the language of a learned French canonist:⁽ⁿ⁾ "Comme il n'y a que les Cardinaux qui créent le Pape, il n'y a aussi que le Pape qui crée les Cardinaux; c'est un principe établi par tous les canonistes."

Nevertheless, as a matter of usage, the Pope does not create Cardinals before the advice and the suffrages of the College of Cardinals have been obtained *in consistorio secreto*. The Council of Basle required that the election of Cardinals should be conducted by the way of *scrutinium* and *publicatio*, with the suffrage in writing of the majority of the Cardinals assembled in their collegiate capacity, *non autem per vota auricularia*. *This rule has been only partially followed. The creation of Cardinals is not held to resemble the election of prelates. [*432]

The number of Cardinals has greatly varied; originally it was about fourteen or fifteen, commensurate with the Churches and parishes served by the priesthood and diaconate of Rome; others were added by Pope Marcellus, who fixed the number at twenty-five.

The schism at Avignon (A. D. 1307-77), led to the extension, as both the French and the Roman Popes were anxious to increase the number of their partisans.

After the death of Pope Martin V. (A. D. 1431), the Cardinals agreed in conclave upon certain articles, the effect of which being to admit the Cardinals to share the revenues and the jurisdiction, both spiritual and temporal, of the Papacy, has, according to high authority, permanently altered the conditions both of the sovereignty itself (*Signoria stessa*) and of the temporal government of the Popes.^(o)

The Council of Basle (A. D. 1434), among various other regulations with respect to the Cardinals, fixed their number at twenty-four, and forbade any increase, "*nisi pro magnâ Ecclesiæ necessitate vel utilitate*."^(p) The Popes, however, utterly disregarded this rule; Leo X. created twenty-one in a single day, in consequence of a conspiracy formed against him, the leader of which was a Cardinal. Paul IV. fixed the number at forty.^(q)

Sixtus V. made what was intended to be a final regulation on this subject by a Bull promulgated in 1586, fixing the number of Cardinals at seventy, and dividing them into three orders:—

(m) D. De Maillane, i. 403. "Cardinal." Ib. ii. 509. "Pape" contains the new regulations of Alexander III. at length.

(n) Ib., i. 408. "Cardinal."

(o) Farini, Lo Stato Romano, iv. 323-5. Lettera IX. al G. Gladstone. See these important articles *in extenso*; he calls them the Magna Charta of the Papal Monarchy.

(p) Tit. xx. De Numero et Qualitate Cardinalium.—Koch, Sanctio Pragmatica, &c., Sylloge Doc. p. 143.

(q) By an *Indultum*, which is known by the name *Compactum*.

1. The first Cardinal Bishops, being in number six.

[*433] *2. The second Cardinal Priests, being in number fifty.

3. The third Cardinal Deacons, being in number fourteen.

Since this regulation, the number appears to have been increased to seventy-two—one being added to the Cardinal Priests, and one to the Cardinal Deacons. But the number is not necessarily or usually filled up.

The Council of Trent decreed that the qualifications as to morals, doctrine, and learning, which they had already specified as needful for the office of Bishop, should be required for that of the Cardinals, "*quos S. S. Pontifex ex omnibus Christianis nationibus, quantum commodè fieri poterit, prout idoneos repperit, assumet.*"(r)

This recommendation or direction evidently tended to give an international character to the Sacred College. It appears, too, that it was the habit of certain nations to choose a Cardinal as the protector of their national ecclesiastical interests; and probably from hence grew up the custom which prevails to this day, that the Sovereigns of certain kingdoms are allowed to nominate a Cardinal(s) from among their own subjects. In France the new-made Cardinal received the insignia of his dignity from the King or his chancellor.(t)

CCCCXXIX. The principal function and privilege of the Cardinal is to give his vote for the election of the Pope—a right incident to every Cardinal who has received the order of deacon, or who has solicited the Pope to bestow upon him that order.(u)

On the tenth day after the death of the Pope, the Cardinals ought to meet in conclave: on the next day the election of the new Pope begins.(x)

[*434] The Cardinals present in conclave *are not bound to await the arrival of those who are absent. Votes cannot be given by proxy. The election is generally *per scrutinium*,(y) on the publication of which the person elected by two-thirds of those present is declared to be the new Pope. If no person be so elected, then the votes are taken again, *in accessa*, until, by the requisite proportion, some person is elected. It would appear, however, from the account of the proceedings after the death of Pius VII., that the testament of a deceased Pope may, in some degree, contract the mode of his successor's appointment.(z)

(r) Sess. xxiv. De Ref. c. 1. Vide post, remarks of Lord Palmerston.

(s) See this claim very distinctly set forth, on the part of France, in 1822, and recognized within certain limits by Pius VII. Artaud, Histoire de Pie VII., t. ii. pp. 593-5.

(t) D. De. Maillane, i. p. 408. "Cardinal."

(u) Devoti Institutionum Canoniarum Libri, t. i. p. 171, (ed. Paris, 1852,).

(x) Ib. p. 260.

(y) According to Devoti, t. i. ss. 18, 19, 20, 21, pp. 271-2: "*Tribus autem modis alio præterea nulla electio perficitur per scrutinium, compromissum, et quasi inspirationem.*"

The *per scrutinium* is to be by three senators; votes are to be collected, 1, *secreto*; 2, *singillatim*; 3, *justo ordine*; 4, *diligenter*: *compromissum* where there is no opposition, but all are unanimous: "*per quasi inspirationem* electio absolvitur cum electores omnes quasi divino spiritu afflati in eum repente feruntur, de quo antea vix cogitaverant." The first of these three modes appears to be generally in use.

(z) "Ensuite le Cardinal La Somaglia, doyen, dit qu'il avait reçu de son prédécesseur Mattéi divers papiers, avec l'ordre de ne les ouvrir qu'après la mort du Pape, et en présence du Sacré Collège rassemblé. Son Eminence décacheta le paquet, et il y trouva deux Brefs, datés de Fontainebleau. Le Pape, dans le

*CCCCXXX. The duty, which ranks next in importance to that of choosing the Pope, is, that of affording counsel to him [*435] and assisting him in the temporal government of his kingdom, and the spiritual government of the world.

This duty is performed, 1st, in consistorio, (a) that is in the assemblage of Cardinals at the Papal Palace, in the presence of the Pope; 2nd, in congregationibus, that is in certain colleges or committees of different official persons, over which a Cardinal presides, and to which a certain portion of the Papal Government is delegated. (b)

The authority of the decisions of these committees (1) as to matters of doctrine (2) as to matters of discipline, and (3) as to the adjudication of particular cases, depends, of course, so far as foreign countries are concerned, upon the law of each country in which the Roman Catholic Church is established.

It is only under great limitations as to the necessary concurrences of the royal, legal, and episcopal authorities, that *these decisions [*436] have ever been allowed to take effect in France. (c)

The same remarks are applicable both as to general usage and, especially the law of France, with respect to the decisions of the tribunal,

premier, ordonnait aux Cardinaux de se réunir immédiatement sous la présidence du Cardinal doyen, et, en dirigeant à toutes les anciennes constitutions, pour ne considérer que l'empire des circonstances et les dangers de l'Eglise, d'élire, dans le plus bref délai, un Pape, à la pluralité des voix. Le second Bref portait les mêmes dispositions, avec la différence que le Pape demandait, pour consacrer l'élection, les deux tiers des voix, en conformité de l'ancien usage. Le Secrétaire du Sacré Collège, Monsignor Mazio, prit alors la parole, et déclara qu'il était dépositaire d'un troisième Bref, dont, par les ordres du Pape, et sous le secret de la confession, il avait été le rédacteur et le seul confident. Ce Bref portait la date du mois d'Octobre, 1821. C'était l'époque où le Pape avait lancé la Bulle contre les Carbonari. Le Saint Père ordonnait que l'on procédât à l'élection aussitôt après sa mort, par acclamation, s'il était possible, et, pour ainsi dire, sur le corps expirant; que cette election se fit en secret, sans attendre les Cardinaux hors de Rome, sans prévenir les ministres accrédités, sans informer les Cours, sans s'occuper des funérailles, avant que l'acte fût consommé. Le Saint Père, avec les expressions les plus pathétiques, recommandait l'union aux Cardinaux, leur rappelait que presque tous étaient ses créatures, et que la reconnaissance, jointe à l'amour de la religion et de la patrie, devait l'assurer de leur obéissance. Ce dernier Bref causa la plus vive sensation. Cependant, toute la congrégation eut la sagesse de reconnaître que les ordres émanés de Sa Sainteté, à l'époque où les suites de la révolution d'Espagne et du Piémont agitaient l'Italie, n'étaient plus applicables aux circonstances actuelles."—Artaud, Histoire du Pape Pie VII. p. 609.

(a) It is in the Consistory that the allocutions of the Pope are made which are in some degree analogous to royal speeches and public declarations of the Executive in other countries.

(b) Of these congregations some have for their more especial object municipal and civil matters of the Roman territory, some the ecclesiastical affairs of a particular nation, others the general care of the Roman Catholic Church, viz. :

Congregatio Consistorialis.

Inquisitionis (over which the Pope usually presides.)—(Devoti, i. p. 171, s. 27.)

Indicis.

Concilii.

Episcoporum ac Regularium.

De Ritibus.

De Indulgentiis et Reliquiis.

De Propaganda Fide.

(c) Lequeux, 364-5-6.

which are concerned with preparing and expediting Letters Apostolic or Rescripts of the Popes, namely, the Cancellaria, Dataria, and Pœnitentiaria.(d) So with respect to the highest Roman tribunal, the Rota Romana, which consists of twelve auditores, one French, one Spanish, one German, the rest Italian; it has no authority in France.(e) The tribunal of the Signature Justitiæ presides over matters of Appeals, Delegation, and Recusation, and the Rescripts are signed by the Pope. The tribunal of the Signature Gratiæ has cognizance of matters in which the favour of the Pope is sought, and in this tribunal he presides in person.

CCCCXXXI. With respect to the rank of the Cardinal(f) at Rome, it is considered next to that of the Pope. For some time Archbishops and Bishops refused to yield precedence to Cardinal Priests and Deacons; but from the order of rank observed at the Council of Lyons, A. D. 1245, it appears that precedence was accorded to Cardinals over all dignitaries, including Patriarchs.

When, in 1440, the Archbishop of York was made Cardinal, the Archbishop of Canterbury demurred to his claim for precedence. But the Pope wrote to the latter prelate, that, as the College of Cardinals represented the Apostles, their universal right of precedence was not to be disputed.

[*437] Their rank in foreign countries must depend upon the laws *and usages of each country, but generally in countries which recognize the supremacy of Rome, their rank has been, with more or less restriction, recognized also.

The Cardinal now resident in England has no rank in that country, but this is probably the consequence of the non-recognition of his mission, and the grievous infraction of International Law with which it was inaugurated. With respect to other Roman privileges of Cardinals, such as those which relate to the holding of benefices and residence at Rome, they are by no means recognized as a matter of course in other countries, and in France they have been denied.(g)

CCCCXXXII. As Cardinals are subjects in one State and Princes in another, and have two allegiances, it may be important to examine the oath which they take to the Sovereign of the country in which they are Princes. That oath is,—

(d) Reiffenstuel, Jus. Can. Univ. l. iii. t. iv. n. 577.

(e) "Apud nos nullam exercet jurisdictionem hoc tribunal."—Lequaux, i. 368.

(f) "C. xiii. s. Sunt autem X. qui filiis. leg. c. xvii. s. Decet de elect. in VI. cardinales, id est cardines orbis consilarii, fratres, familiares aut filii Papæ, cardinales divi, lumina Ecclesiæ, &c. denique faciunt unum corpus cum Papa sicut canonici cum Episcopo," &c.—Barbosa, De Jure Eccles. l. i. c. iv. n. 1.

(g) "On n'a jamais regardé en France les réglemens que les Papes ont faits touchant la résidence des Cardinaux à Rome, comme une loi que les Cardinaux François fussent obligés de suivre." An eminent magistrate at the head of the bar denounced the Bull of Innocent X. as "*abusive*;" they admitted the high rank and dignity of the Cardinal, especially with the Sovereign Pontiff, "auquel ils (les Cardinaux) doivent respect et fidélité particulière; mais cette obligation qui est du *droit positif et humain*, ne peut venir en compétence avec les droits de la naissance et de la nature qui nous attachent de droit divin à nos Souverains, et auquel il n'est pas loisible de résister."—D. De Maillane, i. 413-14; M. du Clergé, t. vi. p. 1047.

“Ego——nuper assumptus in Sanctâ Romanâ [Ecclesiâ] Cardinalem [Cardinatum,] ab hâc horâ in antea ero fidelis beato Petro, universalique et Romanæ Ecclesiæ, ac summo Pontifici ejusque successoribus canonicè intransibilibus. Laborabo fideliter pro defensione fidei Catholicæ, extirpationeque hæresium, et errorum atque Schismatum reformatione, ac pace in populo Christiano: alienationibus rerum et bonorum Ecclesiæ Romanæ, aut aliarum Ecclesiarum et beneficiorum quorumcunque (non) consentiam, nisi in casibus a jurè permissis; et pro alienatis ab Ecclesiâ Romanâ recuperandis pro posse meo operam dabo. Non consulam quidquam summo Pontifici, nec subscribam me nisi secundum *Deum et conscientiam, quæ mihi per sedem Apostolicam commissa fuerint [*438] fideliter exequar, Cultum Divinum in Ecclesiâ tituli mei, et ejus bona conservabo; sic me Deus adjuvet et hæc sacrosancta Dei Evangelia.”(h)

CCCCXXXIII. D'Aguesseau wrote a very learned Mémoire(i) upon the question whether a French Cardinal, guilty of *lèse-majesté*, was exempted, on account of his dignity, from the royal jurisdiction.(k) This great jurist considers the question under four heads, and the Cardinal is considered (1) as a Clerk, (2) as a Bishop, (3) as a Cardinal, (4) as the Diocesan, by virtue of his rank in the College of Cardinals; and the result of his examination into all these points is that the Cardinal is subject to the royal jurisdiction:—“De quelque côté que l'on considère le Cardinal, il est également soumis à la puissance et à la justice du Roi.”(l)

The following passages in this elaborate and international treatise are well worthy of attention:—“Comme le Pape réunit en sa personne la qualité de Prince-Souverain à celle de Chef de l'Eglise, et que contre la doctrine et les sentimens des anciens Papes, il est enfin devenu Roi et Pontife tout ensemble, les Cardinaux, qui sont ses ministres dans ces deux qualités, peuvent aussi être considérés *sous deux faces différentes*; c'est-à-dire, ou dans leur état ecclésiastique, comme principaux ministres de l'Eglise de Rome, et assesseurs du Pape dans les affaires ecclésiastiques, ou dans leur état politique, comme conseil et principaux officiers d'un Prince étranger.”(m) “Quelle est donc, suivant ces principes, la véritable situation d'un Français qui est honoré de la dignité de Cardinal?”

*“Il devient, à la vérité, le conseil, le ministre du Pape, avec [*439] l'agrément et presque toujours par la protection du Roi; il entre par-là au service du Pape, il contracte de nouveaux engagements: mais il ne détruit pas les anciens qui le lient à sa patrie. Le lien qui l'attache à son premier maître, est d'un ordre supérieur à celui qui l'unit au second; l'un est naturel, l'autre est purement civil: l'obligation civile ne détruit pas l'obligation naturelle, et un Cardinal n'en est pas plus dispensé qu'un Général Français qui commande les troupes du Roi

(h) D. De Maillane, i. 413, “Cardinal.”

(i) D'Aguesseau, v. 199, Mémoire où l'on examine si un Cardinal Français qui commet une Crime de Lèse-Majesté, est exempt de la Jurisdiction Royale par sa dignité. A very valuable dissertation on the limits of the spiritual and temporal power.

(k) See Bynkershoek, De F. L. c. vi. p. 455; c. xii. p. 491.

(l) D'Aguesseau, ib. p. 336.

(m) Ib. p. 290.

Catholique, ou qu'un Duc et Pair qui a joint à ce titre celui de Grand d'Espagne, ou qu'un négociant qui va s'établir à Amsterdam ou à Cadiz, par rapport à son commerce."

CCCCXXXIV. D'Aguesseau cites eight precedents for the trial of Cardinals by the law of the land:—

1. Cardinal de Constance in the time of Louis XI., A. D. 1462.
2. Cardinal Ballue, in the same reign, in whose case there was an elaborate discussion between the Ambassadors of France on the one hand, at the Court of Rome, and the Pope and Cardinals on the other.
3. Cardinal de Chattillon, "exemple célèbre," accused and judged by the Parliament.
4. Cardinal de Guise, executed, without the formalities of justice, by Henri III.
5. Cardinal de Bourbon, executed by the same monarch in a similar manner.
6. Cardinal de Plaisance, sent by Pope Clement VIII. to assist the League against Henri IV. The Cardinal was not a born subject of the crown, and was an ambassador. It was held by the parliament of Charles that by joining in a conspiracy he had forfeited his privilege as ambassador, and that he was justiciable by reason of the locality of the crime, though not by reason of his birth.

7. Cardinal de Sourdis, in the reign of Louis XIII., A. D. 1615.

[*440] *8. Cardinal de Retz⁽ⁿ⁾ "exemple équivoque," for the King, then scarcely of age, just emerged from the troubles of his minority, first ordered the Parliament to proceed against the Cardinal, and afterwards applied to Rome for commissioners.

CCCCXXXV. The Roman canonists^(o) say, that as the whole Church of Christ is committed to the charge of the Pope, and as he cannot be present everywhere, it is necessary that he should have deputies armed with his authority and jurisdiction, and hence the institution of *Legates*^(p). Legates are of three kinds:—

1. *Legati a latere*.
2. *Legati missi* or *Nuntii*.
3. *Legati nati*.

CCCCXXXVI. *Legati a latere*^(q) are Cardinals whom the Pope has sent, as it were, from his *own side*, either to foreign Princes or into provinces of the Roman See, clothed with the most ample authority. In the *Decretals*, powers nearly, if not quite equal to those of the Pope,^(r) are conferred on these Legates, and it is provided that they shall continue after the death of the Pope. They were authorised to convene and preside over Councils, with a vote equivalent to that of the whole assembly, to suspend and depose Bishops, and to make laws. These extravagances were partly framed only by the Council of Trent,^(s) but

(n) D'Aguesseau, v. p. 330.

(o) *Devoti*, i. 172, xxix xxxii. C. viii. X. De Off. Leg. C. iii. iv. vi. ix. X. Ib. C. xx. X. De Jure Patron. C. i. VI. De Off. Leg. C. xxiii. X. De Privileg.

(p) For their early history, see Thomassinus, *Discipl. Pt. I. l. ii. cc. 113, 119. De Cardinalibus et Legatis*.

(q) X. I. 30, Sext. I. 15. De. Off. Leg. (r) *Cap. Antiqua*, 23, De Privileg.

(s) *Sess. xxiv c. xx. De Ref.*

the laws and practice of *independent States have so curtailed and limited them,^(t) that the office has fallen into desuetude. [*441] Nevertheless, after the desolating storm of the first Revolution had passed over the Gallician Church, and Napoleon had again opened communications with Rome Pius VII. sent *Cardinal Caprara*, in the character of a *Legate a latere*, to France. The French Government admitted him, and with very large honours, which, however, they partially circumscribed by denying to him the faculty of acting by delegate (*subdelegandi*).^(u)

These Legates are ambassadors of the first rank.

CCCCXXXVII. *Legati missi*, or *Nuntii*, are Papal ambassadors appointed for the execution of some particular business in foreign parts, with powers limited by their credentials.

Nuntii Apostolici are resident Papal ambassadors at foreign Courts.^(x)

Nuntii are ambassadors of the second rank, though sometimes furnished "cum potestate Legati a latere."

Internuntii are those who are appointed provisionally, or who are resident in provinces in which the Sovereign is not present. These are ambassadors of the third rank. For the transactions of matters of minor moment *Ablegati* are sometimes dispatched from Rome.

The chief duties of the Legate or Nuncio are, to watch over *the interests of the Roman See, to apprise the Pope of all matters of [*442] moment passing at a foreign Court, and to obtain canonical information respecting the Bishops nominated by the Crown.^(y) They have no jurisdiction unless by the permission of the State to which they are sent.^(z)

Their powers, therefore, no longer depend upon one general law, but upon the particular instructions given to them, and on the law and usage of the country to which they are sent. This has been the consequence of the dispute at the close of the last century with respect to perpetual or *standing nuntiaturas*.^(a.)

CCCCXXXVIII. The title of *Legati nati*^(b) was conferred upon certain foreign dignitaries, to whose See or Crown the power and office of Legate was perpetually annexed. Such were the Archiepiscopates of

(t) "Aucun individu, se disant Nonce, Legat, Vicaire, ou Commissaire Apostolique, ou se prévalant de toute autre dénomination, ne pourra sans l'autorisation du Gouvernement, exercer sur le sol Français, ni ailleurs, aucune fonction relative aux affaires de l'Eglise Gallicane."—Artic. Organiques, art. ii. Walter, Kirchenrecht, s. 143. Thomass. Discip. ubi supr.

(u) The Papal letters, "*Qui Christi Domini*," conferred on the Legate "potestatem constituendi novas Ecclesias Galliarum: singulorum Dioecesium fines determinandi: probandi statuta capitulorum, eisque concedendi choralia insignia, quæ iis convenire arbitrebitur: paræcias circumscribendi: procedendi per se ad constitutionem Ecclesiarum: dispensandi, condonandi: imò et *subdelegandi*."—Lequeux, i. 380. Bulletin des Lois, III^e Série, N^o. 1374.

(x) Vide ante, p. 167, n. (k), formerly *apocrisiarii* or *responsales*, Nov. 123, c. 25.

(y) "Nullum apud nos Nuntii jurisdictionis actum exercent."—Lequeux, i. 380.

(z) "Ihre Vollmachten hängen von ihren besondern Instructionen, ihre Zulassung von der Regierung des betreffenden Landes ab."—Walter, Abschen. 144. C. un Extr. Comm. de Consuet. i. 1, is now held contrary to the *jus commune* of the Church and of States.

(a) Pachmann, Lehrbuch des Kirchenrechts, s. 182.

(b) Devoti, i. 175.

Rheims, Bordeaux, and Lyons in France; of Canterbury and York in England; of Toledo and Taragona in the Spanish peninsula; of Salzburg, Cologne, and Prague in Germany; of Pisa in Italy; the Crown of Hungary and the Crown of the Two Sicilies—*apostolica regni Siciliae Legatio*.(c)

In process of time it was found that the Papal power was rather weakened than strengthened by these perpetual and unchangeable Legates, and it is probable that the provisional title is the only memorial of former authority which they now retain. Except, indeed, in the case of the Crown of Hungary, for Pope Sylvester conferred this privilege upon [*443] *King Stephen.(d) Except, also, in the case of the King of the Two Sicilies; this privilege of the Sicilian Monarchy is founded upon a Bull of Urban II. to Roger (1099,) and was expressly confirmed by a Bull of Benedict XIII. (1728.) The King exercises, or did exercise, *jurisdiction* as Legate through a special tribunal of his own (*Monarchia Sicula*.)

The Commissarius Apostolicus, sometimes called Delegatus, is an officer despatched by the Pope to obtain information upon a particular matter.

The vicarius Apostolicus is an officer through whom the Pope exercises authority in parts remote, and who is sometimes sent with episcopal functions into provinces where there is no Bishop resident, or where there has been a long vacancy of the see, or in infidel or heretical countries.(e)

The Præfecti Apostolici are officers of the same character, but without the power of exercising episcopal functions.

CCCCXXXIX. There remains the question as to whether the Pope may be deposed for his offences, and by whom?

In the case of any other Sovereign, such a question would not properly be answered in any treatise on International Law. First, because it is a question rather of Public than of International Law; and secondly, because it is neither prudent nor right to attempt to lay down rules for a case, which, if it ever happen, must be superior to all rule, save that which the necessity itself may suggest and justify. But the character of the Pope as Universal Spiritual Chief gives foreign countries a direct interest in that question; and, moreover, it is one which has undergone consideration, and of which a solution has been attempted.

[*444] *Here, again, as in so many matters relating to the Pope, there are two distinct opinions maintained by ultra and cis-montane canonists. The former maintain the impossibility of the Pope's trial or deposition, on account of his infallibility, and of his superiority to every earthly tribunal. The latter hold the superiority of General Councils of

(c) Walter, Kirchenrecht, Abschn. 144, "Doch hängen nur Ehrenrechte davon ab."

(d) "Sich das Kreuz, als Zeichen des Apostolats allenthalben vortragen zu lassen, und nach dem Masse der göttlichen Gnade, und als *Stellvertreter des Papstes*, die gegenwärtigen und künftigen Kirchen des ungarischen Reiches einzurichten, zu ordnen, und mit Vorzügen auszuzeichnen."—Benedict XIV. De Synod. Dioc. l. ii. c. vi. cited by Pachmann, s. 181.

(e) The right to nominate these officers rests upon the Pope's claim to universal jurisdiction, and on what is called by canonists the *jus devolutionis*.—Walter, *ib*.

the Church to the Pope, the possibility of his erring, and that he is not exempt from the *jus commune* whereto every Bishop or dignitary of the Church is canonically responsible for certain offences, and that bad Popes have been lawfully deposed both by Emperors and by Councils.

The Council of Basle distinctly asserted three propositions :—

1. That a General Council was superior to the Pope, and that he owed obedience to it.

2. That he might be punished (*debité puniatur*) for disobedience to it.

3. That by this Council the Cardinals are enjoined to remonstrate first personally, then in their collegiate capacity, with an erring Pope, and lastly, to denounce him, if he do not amend, at the next General Council. (f)

“Non nostrum est tantes inter componere lites.”

But it is necessary to add, that, both in the convocation and in the proceedings of a General Council, all Christian nations must be interested.

CCCCXL. We have arrived at the conclusion of the observations on the relations of foreign States with the Papacy,—perhaps by a longer road than to many readers may have seemed necessary,—but it is a conviction which has grown upon the writer of these pages that the subject is not only one deeply affecting the Public Law of all States, but that it is properly and strictly one of International Jurisprudence. (g) The laws which govern the relation and intercourse, *be it spiritual or temporal, between the subjects of one State and the ruler of [445] another, are surely part of the *jus inter gentes*. The fact that the Pope is an Independent Temporal Sovereign as well as a great Spiritual Chief. does indeed complicate, and for the present inextricably, the difficulty, but it does not take away the international character of his relations with the subjects of other States.

This fact, on the contrary, introduces a new problem of International Law, namely, with respect to the Right of Intervention (h) in the affairs and internal government of the subjects of this hybrid State. During the recent revolutions on the Continent and in Italy, the difficulty of reconciling the duties of temporal Prince of the nation with those of the Spiritual Chief of all nations was made very evident. (i) At one time the Pope blesses the banners of his subjects, going forth to fight, as they say, the battle of Italian liberty; at another time he disclaims the use of all temporal weapons, and declares that his position is one of necessary neutrality. Such is the conduct of the Papacy in its direct temporal relations. But the same incompatibility of functions and offices appears to render all his domestic affairs foreign affairs. At one moment the

(f) Art. ii. iii. vi. vide Koch, Sanctio Pragm. Sylloge Doc. pp. 112, 147. Can. lviii. Dist. 50. Can. vi. c. xxv. s. 1.

(g) “Comme chef d’une société religieuse, le Pape n’a qu’une autorité limitée par des maximes connues, qui ont plus particulièrement été gardées parmi nous, mais qui appartiennent au droit universel des nations.”—Portalès, D. discours sur l’Organisation des Cultes, p. (Paris : 1845.)

(h) Vide ante, vol. i. pt. iv. c. i. on Intervention.

(i) See Martens, Rec. Gen. de Tr. t. ix. (A. D. 1846) for the public documents &c. of Pio Nono.

Pope confers a constitutional government on his three million subjects, placed geographically and morally in the heart of a great nation—subdivided, indeed, into different kingdoms, but of one blood, one feeling, one language. At another, this constitutional government is withdrawn, because it is inconsistent with the spiritual duties and interests of the Papacy.

The Pope, dismayed and disgusted—let us say with good reason—at the acts of his ministers, flies from his kingdom; so did the late King of the French, Louis Philippe.

[*446] *We have already discussed(*k*) what course, in such circumstances, the sound principles of International Law, as well as the improved practice of nations, require foreign States to pursue, viz., that to stand aloof and be neutral is the rule, to intervene is the exception.

The rule was accordingly followed in the case of Louis Philippe, the exception in the case of Pio Nono. Why? The revolutionary Government which succeeded the expulsion of the French monarch was, on the principle of vicinage, more dangerous to the established governments of other States than the expulsion of the Italian Sovereign. The answer, however, is, that the Italian Sovereign was the Spiritual Chief of Roman Catholic nations, and therefore they were justified in intervening in the domestic affairs of another State, because it is essential to the position and dignity of their Spiritual Chief that he should rule as he pleases over a certain portion of Italy. On this principle, Pio Nono is restored by a foreign army to his throne: but this abnormal and exceptional state of things does not end here; so well is it understood that the people over whom he rules would not accept the government of their ruler, that the foreign army remains, on the ground of being absolutely necessary for the protection of the Sovereign thus restored.(*l*)

It is not, it will be observed, intended to apply the slightest approbation of the late temporary Republic of Rome, of the actors in it, or their acts. They may be admitted to have been very wicked, very base, and very foolish, without much, if at all, affecting the question under consideration. The object is to point out the principal anomalies to the fundamental rules of International Law, which the double *character [447] of the Pope actually does, or is supposed to render necessary.

We have seen that the cardinal doctrine that “every State has a right to choose its own form of government without the interference or control of any foreign Power,”(*m*) is not held to be applicable to the three million inhabitants of the Roman State. There remains a difficult question about the Balance of Power—that principle for which so much blood has been, and is being shed, and the value of which has been already discussed at length.(*n*)

It may be, perhaps, not unreasonably argued that the occupation of

(*k*) Vide ante, vol. i. p. 164, pt. iii. c. iii. Right to a Free Choice of Government; pt. iv. c. i. on Intervention: and in this volume, pt. v. c. iv. p. 15, as to Recognition.

(*l*) “E. manifesto che il cadavere ne sta ritto solo, perché Francia ed Austria lo sorreggono con due eserciti.”—Farini, t. iv. p. 344.

(*m*) Vide ante, vol. i. p. 164.

(*n*) Ib. p. 447, &c.

the central kingdom of Italy by Austrian and French troops(o) did obviously disturb the equilibrium of Europe. It was, indeed, on this principle that, some years ago, French troops occupied Ancona, when Austrian troops were marched into the Roman States. All States, whatever be their Established Church, are equally interested in maintaining this equilibrium. May then Prussia, England, Russia, and Spain send an armed force to Rome? There is this answer, that the Pope invites the Austrians and French. This is true; and it has been shown that circumstances may justify foreign nations in intervening at the request of either party in a civil war; but what would have been the confusion in Europe and the world, if other States had been invited by the other party in this civil war to intervene on their behalf, and had accepted *the invitation,—if Prussia and England had intervened in the centre, as Sardinia had done in the North of Italy? [*448] Lastly, it is not only Roman Catholic States that were interested in events affecting the status of the Pope. Prussia and England have millions of Roman Catholic subjects. But a little while ago, as we have seen, an Apostolic Letter threw England into a ferment, which to be believed must have been witnessed.

In 1849, during the civil wars in Italy, the English Minister for Foreign Affairs carried on a very important correspondence with our ambassador abroad, in which he made the following, among other observations :—

1. That England would not, on account of her Roman Catholic subjects, view with indifference what was passing in the Roman States.(p)

2. That she desired that the Pope should occupy an independent temporal position, in order that he might not become the political instrument of any one European Power.(q)

3. That there was, nevertheless, a great difficulty in making the Roman States an exception to the general rule of noninterference between any foreign people and their Sovereign.

4. That the position of the Pope differed from that of other Sovereigns, as he was elected by the College of Cardinals, a body neither national in its constitution nor in its membership.

5. That the Pope ought to give his subjects securities for good government.

6. That for that object a separation should be made between the spiritual authority and the temporal powers and institutions of the State.

(o) It is true that England was consulted before this took place. Lord Normanby writes from Paris to Lord Palmerston (July 23, 1849,) "He (M. de Tocqueville) took this opportunity of again repeating what he had said to me upon former occasions, that though England, for reasons given by your Lordship, had declined to take any active part in the present negotiations when invited by the Pope, he hoped she would, nevertheless, in some shape, give to such an arrangement as she had formerly wished to see effected, the moral support of her advice and counsel, either at Gaeta or at Rome. The active interest she might show upon this subject, would be an additional security that whatever reforms were promised would be sincerely executed."—Correspond. respecting the Affairs of Rome, 1849, presented to Parliament 14 April, 1851.

(p) Vide ante, vol. i. p. 443.

(q) See the opinion of Portalis, Discours sur l'Organization des Cultes. Discours, &c., par le Vicomte F. Portalis, s. 33. (Paris: 1845.)

7. That an armed intervention to assist the Pope in retaining a bad Government would be unjustifiable.(r)

[*449]

*CHAPTER XI.

THE INTERNATIONAL STATUS OF THE PATRIARCHATE OF CONSTANTINOPLE.(a)

CCCCXLI. IN the time of Pope Gregory the Great(b) (A. D. 595,) and while Maurice was Emperor of Constantinople, John, the Patriarch of Constantinople, openly assumed the title of Universal Bishop, claiming thereby apparently a spiritual supremacy over the whole Christian world.(c) The letters written by Gregory to the Emperor, to the Patriarch, and to certain Bishops, are among the most valuable monuments of Ecclesiastical History, and, indeed, of Ecclesiastical International Law.

These letters of this illustrious(d) prelate, in which he denies the right of any Patriarch or Bishop to arrogate to himself the title of Universal Bishop, and denounces the usurper of this foolish, offensive, and unchristian appellation as the precursor of Antichrist,(e) will well repay the perusal *of all who take an interest in those events, [450] which combine the most remarkable features of civil and ecclesiastical history.(f)

CCCCXLII. More than a century passes away between the Pontificate of Gregory I. (the Great) and that of Gregory II.(g) But both Popes

(r) Correspondence between Viscount Palmerston, the Marquis of Normanby, and Prince Castalcicala, laid before Parliament, June 15, 1849.

(a) Walter's Kirchenrecht, ss. 168-173. Verfassung der Morgenländischen Kirche.

(b) His Pontificate lasted from A. D. 590 to A. D. 604.

(c) Vide ante, p. 292.

(d) The blot upon his character in his adulatory letter to the wretch Phocas; but even Gibbon says that "Gregory might justly be styled the Father of his Country."—Decline and Fall, vol. iii. p. 176, (ed. Milman.)

(e) L. vii. ep. xxxiii.: "Eundem verò fratrem et coepiscopum meum studiosè admonere curavi, ut si habere pacem omnium concordiamque desiderat ab *stulti* vocabuli se appellatione compescat." . . . "Ego autem fidenter dico, quia quisquis se *Universalem Sacerdotem* vocat, vel vocari desiderat, in *elatione* suà *antichristum præcurrit*, quia superbiendo se cæteris præponit."

Ep. xxxi.: "Ut *verbum superbiæ*, per quod *grave scandalum* in Ecclesiis generatur, auferre festinetis."

Some expressions of the kind occur in most of the ten letters.

(f) The reader is referred to:— Liv. v. ep xviii. (Ad Johannem Episcopum) Ep. xix. (Ad Sabinianum Diaconum.) Ep. xx. (Ad Mauricium Augustum.) Ep. xxi. (Ad Constantinum Augustum.) Ep. xliii. (Ad. Eulogium et Anastasium Episcopos.) Lib. vii. ep. xxvii. (Ad Anastasium Episcopum.) Ep. xxxi. (Ad Cyriacum Episcopum.) Lib. viii. ep. xxxiii. (Ad Mauricium Augustum.) Lib. viii. ep. xxx. (Ad Eulogium Episcopum Alexandrinum.) Lib. xiii. ep. xl. (Ad Cyriacum Patriarcham Constantinopol. Sancti Gregorii Papæ I. Cognomento Magni Opera Omnia, t. ii. (Parisiis: Sumptibus Claudii Rigaud, 1705.)

(g) Extended from A. D. 715 to 731.

were brought into especial contact with the Patriarchate of Constantinople. According to the opinion of Gibbon, certainly important on this point, the Patriarchs of Rome and Constantinople were at this time nearly equal in ecclesiastical rank and jurisdiction.^(h) But the Greek Patriarch was under the immediate yoke of a tyrannical Prince, which the distant Roman Patriarch had been long striving to shake off.

When the imperial iconoclast, Leo, was making that assault upon the devotional use of images, which—trifling as it seems to the infidel philosopher—was fraught with serious consequences to the future peace of Christendom, he received from Gregory II. a letter, which contains a passage bearing upon the present subject:—"Are you ignorant" (Gregory writes) "that the Popes are the bond of union, the mediators of peace between the East and West?"⁽ⁱ⁾ When the *iconoclast had ceased to reign, the power of the Byzantine Emperor in Italy [*451] had dwindled into the Exarchate of Ravenna, and was practically confined within the walls of that city.

The restoration of the Western Empire by Charlemagne, which has been mentioned in the preceding pages,^(k) was followed by the separation of the Latin and Greek Churches. In what degree a difference of religious opinion upon the most inscrutable of mysteries, national animosity, and arrogance on the part of Rome contributed to produce that schism, which the lapse of ten centuries finds unhealed, it is not within the compass of this work to consider.

In the turbulent period between A. D. 857-886, Pope Nicholas I. and the Patriarch Photius had mutually denounced and deposed each other. But it was not until A. D. 1054 that the Pope sent his legates to excommunicate formally the Church of Greece and the Patriarch of Constantinople in his own metropolis, and to deposit the Latin anathema on the altar of Saint Sophia. The failure of the attempt to reunite the two Churches at the Council of Florence (A. D. 1439) has been previously noticed.^(l)

The conquest of Constantinople by the Turks (A. D. 1453) was followed by that long and cruel oppression of the Greek Church, from which she has been, during the last few years, partially relieved; and her complete emancipation from which appears, so altered is the state of things, to be no impossible result of the war which is now being waged for the protection of the Ottoman Power.

CCCCXLIII. The Patriarch of the East has not renewed that claim to the title of Universal Bishop which drew down upon him the just rebuke of the Patriarch of the West.

It is not easy to define the existing relations of the Patriarchate *of Constantinople to the Russian Church.^(m) The Patriarch, [*452]

(h) *Decline and Fall*, vol. ix. p. 131.

(i) Gibbon, vol. ix. p. 136. At p. 134, he has this note: "The two epistles of Gregory II. have been preserved in the Acts of the Nicene Council, t. viii. pp. 651-674. They are without date, which is fixed by Baronius in 726; by Muratori (*Annal. d'Italia*, vi. p. 120.) in 720; by Pagi in 730."

(k) Vide ante, pp. 294-7.

(l) Vide ante, p. 336.

(m) Strahl, *Beytrage zur Russischen Kirchengeschichte*. (Halle, 1827.) Neale, *History of the Holy Eastern Church*, vol. i. p. 55.

while these pages are being written, is reported to have rebuked the Emperor of Russia for the schismatic condition of the Church in that country, and to have refused his proffered protectorate for the Greek Church. *(n)*

The Patriarch of Constantinople has recently entered into a Concordat with the Crown of Greece. The ministers of that Crown sent a formal letter to the Patriarch, accompanied by an unanimous decree of the Holy Synod of Greece, dated May 30, 1850. This document contained the following among other propositions:—"That the Synod of Greece holds as a most solemn obligation the duty of piously conceding the primacy guaranteed by the sacred canons to the œcumenical Throne of Constantinople, as the first Chair of the Catholic Apostolic Orthodox Church, and to commemorate first, him who sits thereon, in the sacred diptychs, according to the established order of the Church. In addition to this, wherever spiritual questions may arise which require united deliberation and action, for the greater edification and confirmation of the Orthodox Church, they recognise it to be a duty that reference should first be made to that Chair." *(o)*

This and the other propositions of the letter were formally ratified and confirmed by the Patriarch of Constantinople, his associate Synod and Suffragans, in a Synodical decree.

[*453] *CCCCXLIV. It is remarkable, that not long before the Papal aggression in England, which has just been discussed, Pius IX. made an attack of a similar character upon the Eastern Church.

On the 6th of January, 1848, he issued "an Encyclical Letter of the One Holy Catholic and Apostolic Church to the Orthodox in all parts," in modern Greek, "to the Easterns," containing some very unfortunate errors,—among others, a reference to the Council of Carthage, instead of Chalcedon; *(p)* but neither this mistake nor the modern Greek appears to have been the cause of the great irritation and offence caused by this memorable epistle, of which it is now not easy to obtain a copy: it was the assumption of authority, the implicit denial of the Greek Episcopate, which roused this long-oppressed Church, and caused it to return, in classical Greek, "an answer, which will never be forgotten, of the Orthodox Eastern Church to the Encyclical Epistle of His Holiness the Pope of

(o) "The Greek Patriarch at Constantinople, M. Anthimos, had addressed a remarkable circular to his co-religionists. Hearing that some Greeks manifested hostile sentiments towards the allies of Turkey, the Patriarch censured their conduct, and passed a high encomium on the noble disinterestedness with which the Western Powers defend the cause of the weak against the strong. In conclusion, he pronounced a solemn anathema, in the name of the Eastern Church, against the schism, calling itself orthodoxy, which has transferred to St. Petersburg the spiritual authority in religious matters."—Times, August 31st, 1854.

(n) These documents were printed in a modern Greek journal called the *Αἰών*, and are translated in the April number of the Scottish Ecclesiastical Journal for 1851.

(p) The mistake is singular, for Gregory the Great thus speaks of the compliment paid to Rome by the Council of Chalcedon: "*Si enim universalem me Papam vestra Sanctitas decit, negat se hoc esse, quod me fatetur universum. Sed absit hoc. Recedant verba quæ vanitatem inflent et caritatem vulnerant. Et quidem in Sanctâ Chalcedonensi Synodo, atque post a subsequentibus Patribus hoc decessoribus meis oblatum vestra Sanctitas novit. Sed tamen nullus eorum uti hoc unquam vocabula voluit: ut dum in hoc mundo honorem Sacerdotum diligenter omnium, apud omnipotentem Deum custodirent suum.*"—L. viii. ep. xxx.

Rome lately sent to the Easterns." This answer corrected the historical errors of the Pope, and enumerated the offences against the unity and peace of the Church committed by Rome, while it vindicated the faith of the Greek Church in a manner worthy of its best days. (*q*)

*We have already considered the claim of the Emperor of Russia(*r*) to protect the subjects of the Porte, who are members of [**454*] the Greek branch of the Catholic Church,—and would that we could speak in the past tense of the terrible war into which this pretension has plunged Europe, and perhaps the world!

It only remains to add that the great Powers of Europe, who, in 1827,^(s) had intervened for the purpose of establishing the Kingdom of Greece, intervened again in 1853 to guarantee that the successors to the Throne of Greece should profess the faith of the orthodox Eastern Church. (*t*)

(*q*) Scottish Ecclesiastical Journal, January, 1851. Neale, History of the Holy Eastern Church, vol. ii. pp. 1192–1202.

The Signatures to the Eastern Encyclic are as follows:—

"Anthimus, by the mercy of God, Archbishop of Constantinople, New Rome, and Œcumenical Patriarch, in Christ our God a beloved brother and bedesman."

"Hierotheus, by the mercy of God, Patriarch of Alexandria and of all Egypt, in Christ," &c.

"Methodius, by the mercy of God, Patriarch of the great city of God, Antioch, and of all the East, in Christ," &c.

"Cyril, by the mercy of God, Patriarch of Jerusalem and of all Palestine, in Christ," &c.

THE HOLY SYNOD IN CONSTANTINOPLE.

Paisius of Cæsarea.
Anthimus of Ephesus.
Dionysius of Heraclea.
Joachim of Cyzicus.
Dionysius of Nicomedia.
Hierotheus of Chalcedon.
Neophytus of Derci.
Gerasimus of Hadrianople.
Cyril of Neocæsarea.

Theocletus of Berrhæa.
Meletius of Pisidia.
Athanasius of Smyrna.
Dionysius of Melenicus.
Paisius of Sophia.
Daniel of Lemnos.
Pantelermon of Drynopolis.
Joseph of Ersecuim.
Anthimus of Bodena.

THE HOLY SYNOD IN ANTIOCH

Zacharias of Arcadia.
Methodius of Emesa.

Joannicius of Tripolis.
Artemius of Laodicea.

THE HOLY SYNOD IN JERUSALEM.

Meletius of Petra.
Dionysius of Bethlehem.
Philemon of Gaza.
Samuel of Neapolis.

Thaddeus of Sebaste.
Joannicius of Philadelphia.
Hierotheus of Tabor.

(*r*) Vide ante, vol. i. pp. 470–483. INTERVENTION ON THE GROUND OF RELIGION.

(*s*) Vide ante, vol. i. pp. 105–7, 444–7, 479.

(*t*) Ann. Reg. vol. xc.

CONTENTS OF APPENDIX.

The pages referred to are those between brackets [].

APPENDIX I. (Page 15, ch. 4.)

RECOGNITION.

1. Mr. Canning's Despatches relating to the South American Spanish Republics, October 9th, 1823; January 30th, 1824; March 25th, 1825, ...	461
2. Mr. Canning's Despatch relating to Greece, ...	476
3. Protocol of Conference in London relating to Belgium, 1830.—Lord Palmerston, ...	478

APPENDIX II. (Page 37, ch. 5, sect. xxxi.)

FRAUDS UPON, AND BREACHES OF FOREIGN MUNICIPAL LAW, NOT COGNIZABLE IN THE COURTS OF ENGLAND, OR IN THE UNITED STATES OF NORTH AMERICA.

1. Boucher v. Lawson, ...	483
2. Holman and Others v. Johnson, alias Newland, ...	484
3. James v. Catherwood, June, 1823, ...	487
4. Case of the London, ...	488
5. Smith v. Marconnay, ...	489
Santissima Trinidad, the, ...	489
Dr. Story, Opinion, ...	489
Pothier, Œuvres de, Traité d'Assurance, Passage from, ...	490

APPENDIX III. (Page 79, ch. 8.)

TREATIES—INTERPRETATION OF.

1. Interpretatio, s. 4. Pacis Monasteriensis, 30 January, 1648, ...	491
2. Letter of Sir Leoline Jenkins to the Lords of the Privy Council December 1, 1668, ...	492
3. Hotham v. East India Company, ...	499
4. Maryatt v. Wilson, May 6, 1799, ...	506
5. Case of the Jonge Josias, July 29, 1829, ...	517
6. Sutton v. Sutton, July 29, 1830, ...	521
7. Maltass v. Maltass, July 17, 1844, ...	530
8. Russo-Dutch Loan, Statutes relating to, ...	536

APPENDIX IV. (Part VI. ch. 1. Pages 117-133.)

RIGHTS OF SOVEREIGNS—CASES RELATING TO.

1. The Columbian Government v. Rothschild, ...	542
2. Hullet and Co. v. King of Spain, ...	548
3. King of Spain v. Hullett and Widder, ...	553
4. Rothschild v. Queen of Portugal, ...	565
5. Duke of Brunswick v. King of Hanover, ...	567
6. De Haber v. Queen of Portugal, ...	591
7. Wadsworth v. Queen of Spain, ...	599
8. Decisions in French Courts respecting:—	
1. Republic of Haiti, ...	604
2. Viceroy of Egypt, ...	611

APPENDIX V. (Pages 141-2, s. cxxvii.)

EMBASSY.

1. Instrument of Subrogation.—Extract from Merlin, Répertoire de Jurisprudence, tit. Ministre Public, vol. x. sec. 10, p. 256, ...	621
2. Statute 7 Anne, cap. 12. (P. 198, s. clxxxix.)	624
3. Mémoire of the French Minister (1772) on the Privileges of Ambassadors.—De Martens, Causes Célèbres, t. ii. p. 112, ...	626
4. Ambassadors, Civil Jurisdiction, &c.—Taylor and Others v. Best.—Law Journal, vol. xxiii. p. 89, (Common Pleas.) (P. 202, s. exciii.)	631
<i>When compellable to give security for costs.</i>	
5. Emperor of Brazil v. Robinson.—5 Dowling's Reports, 524, ...	642
6. Law of United States of North America. (P. 186, s. clxxii. P. 206. s. excv.)	643
7. Decisions in French Courts respecting, ...	648

APPENDIX VI. (Page 258, ss. cclix. cclx.)

CONSULS.

1. Treaty respecting, between the United States of North America and France, 14th November, 1788, ...	651
2. Spain Ordonnance respecting Foreign Consuls, 8th May, 1827, ...	657
3. Prussian Rescript, relating to the Authority of English Consuls in matters of Sea Protests of English Subjects, ...	658
4. Greece.—Consular Regulations, ...	661
5. Decisions in French Courts respecting, ...	663

APPENDIX VII. (Page 438.)

INTERNATIONAL RELATIONS OF FOREIGN SPIRITUAL POWERS WITH THE STATE.

1. Memoir of D'Aguesseau upon the Royal Jurisdiction over a Cardinal who is a French Subject, ...	670
2. Correspondence of the English Secretary of State for Foreign Affairs respecting the Affairs of Rome, present to Parliament, 15th June, 1849, ...	675
3. Regulations of the College of Cardinals after the Death of Martin V. (A. D. 1431.) Extract from Lo Stato Romano of Farini, vol. iv. pp. 322—325, ...	688

APPENDIX I. (PAGE 15. CHAP. 4.)

RECOGNITION.

COMMUNICATIONS WITH FRANCE AND SPAIN, RELATING TO THE SPANISH
AMERICAN PROVINCES.(a)

No. 1.

(Extract of a Memorandum of a Conference between the Prince de Polignac and Mr. Canning, held Oct. 9, 1823.)(b)

*THE Prince de Polignac having announced to Mr. Canning that His Excellency was now prepared to enter with Mr. Canning [*461] into a frank explanation of the views of his Government respecting the question of Spanish America, in return for a similar communication which Mr. Canning had previously offered to make to the Prince de Colignac on the part of the British Cabinet, Mr. Canning stated :—

“That the British Cabinet had no disguise or reservation on that subject; that their opinions and intentions were substantially the same as were announced to the French Government by the despatch of Mr. Canning to Sir Charles Stuart, of the 31st of March, which despatch that ambassador communicated to M. de Chateaubriand, and which had since been published to the world.

“That the near approach of a crisis, in which the affairs of Spanish America must naturally occupy a great share of the attention of both Powers, made it desirable that there should be no misunderstanding between them on any part of a subject so important.

“That the British Government were of opinion, that any attempt to bring Spanish America again under its ancient submission to Spain, must be utterly hopeless, that all negotiation for that purpose would be unsuccessful, and that the prolongation or renewal of war for the same

(a) Presented to both Houses of Parliament, by command of His Majesty, 4th March, 1824.

(b) State Papers, vol. ii. pp. 49–53.

object would be only a waste of human life, and an infliction of calamity on both parties, to no end.

[*462] **“That the British Government would, however, not only abstain from interposing any obstacle, on their part, to any attempt at negotiation which Spain might think proper to make, but would aid and countenance such negotiation, provided it were founded upon a basis which appeared to them to be practicable; and that they would, in any case, remain strictly neutral in a war between Spain and the Colonies, if war should be unhappily prolonged.*

“But that the junction of any Foreign Power, in an enterprise of Spain against the Colonies, would be viewed by them as constituting an entirely new question, and one upon which they must take such decision as the interests of Great Britain might require.

“That the British Government absolutely disclaimed, not only any desire of appropriating to itself any portion of the Spanish Colonies, but any intention of forming any political connexion with them, beyond that of amity and commercial intercourse.

“That in those respects, so far from seeking an exclusive preference for British subjects over those of foreign States, England was prepared, and would be contented, to see the mother country (by virtue of an amicable arrangement) in possession of that preference, and to be ranked, after her, equally with others, on the footing of the most favoured nation.

“That, completely convinced that the ancient system of the Colonies could not be restored, the British Government could not enter into any stipulation binding itself either to refuse or to delay its recognition of their independence.

“That the British Government had no desire to precipitate that recognition so long as there was any reasonable chance of an accommodation with the mother country, by which such a recognition might come first from Spain.

“But that it could not wait indefinitely for that result; that it could not consent to make its recognition of the New States dependent upon that of Spain; and that it would consider any foreign interference, by force or by menace, in the dispute between Spain and the Colonies, as a motive for recognizing the latter without delay.

“That the Mission of Consuls to the several provinces of Spanish America, was no new measure on the part of this country,—that it was one which had, on the contrary, been delayed, perhaps too long, in consideration of the state of Spain, after having been announced to the Spanish Government, in the month of December last, as settled, and even after a list had been furnished to that Government of the places to which such appointments were intended to be made.

“That such appointments were absolutely necessary for the protection of British trade in those countries.

“That the old pretension of Spain to interdict all trade with those countries, was, in the opinion of the British Government, alto-
[*463] *gether *obsolete; but that, even if attempted to be enforced against others, it was, with regard to Great Britain, clearly inapplicable.*

"That permission to trade with the Spanish Colonies had been conceded to Great Britain in the year 1810, when the mediation of Great Britain between Spain and her colonies was asked by Spain and granted by Great Britain; that this mediation, indeed was not afterwards employed, because Spain changed her counsel, but that it was not, therefore, practicable for Great Britain to withdraw commercial capital once embarked in Spanish America, and to desist from commercial intercourse once established.

"That it had been ever since distinctly understood that the trade was open to British subjects, and that the ancient coast laws of Spain were, so far as regarded them at least, tacitly repealed.

"That, in virtue of this understanding, redress had been demanded of Spain in 1822, for (among other grievances) seizures of vessels for alleged infringement of those laws; which redress the Spanish Government bound itself by a Convention (now in course of execution) to afford.

"That Great Britain, however, had no desire to set up any separate right to the free enjoyment of this trade; that she considered the force of circumstances, and the irreversible progress of events, to have already determined the question of the existence of that freedom for all the world; but that, for herself, she claimed, and would continue to use it; and should any attempt be made to dispute that claim, and to renew the obsolete interdiction, such attempt might be best cut short by a speedy and unqualified recognition of the independence of the Spanish American States.

"That, with these general opinions, and with these peculiar claims, England could not go into a joint deliberation upon the subject of Spanish America upon an equal footing with other Powers, whose opinions were less formed upon that question, and whose interests were less implicated in the decision of it.

"That she thought it fair, therefore, to explain beforehand, to what degree her mind was made up, and her determination taken."

The Prince de Polignac declared—

"That his Government believed it to be utterly hopeless to reduce Spanish America to the State of its former relation to Spain.

"That France disclaimed, on her part, any intention or desire to avail herself of the present state of the Colonies, or of the present situation of France towards Spain, to appropriate to herself any part of the Spanish possession in America, or to obtain for herself any exclusive advantages.

"And that, like England, she would willingly see the mother country in possession of superior commercial advantages, by amicable arrangements; and would be contented, like her, to rank, after the mother country, among the most favoured nations.

*"Lastly, that she abjured, in any case, any design of acting [*464] against the Colonies by force of arms."

The Prince de Polignac proceeded to say—

"That, as to what might be the best arrangement between Spain and

her colonies, the French Government could not give, nor venture to form, an opinion, until the King of Spain should be at liberty.

"That they would then be ready to enter upon it, in concert with their allies, and with Great Britain among the number."

In observing upon what Mr. Canning had said, with respect to the peculiar situation of Great Britain, in reference to such a Conference, the Prince de Polignac declared—

"That he saw no difficulty which should prevent England from taking part in the Conference, however she might now announce the difference in the view which she took of the question from that taken by the allies. The refusal of England to co-operate in the work of reconciliation might afford reason to think, either that she did not really wish for that reconciliation, or that she had some ulterior object in contemplation—two suppositions equally injurious to the honour and good faith of the British Cabinet."

The Prince de Polignac further declared—

"That he could not conceive what could be meant, under the present circumstances, by a pure and simple acknowledgment of the independence of the Spanish Colonies; since, those countries being actually distracted by civil wars, there existed no government in them which could offer any appearance of solidity; and that the acknowledgment of American Independence, as long as such a state of things continued, appeared to him to be nothing less than a real sanction of anarchy."

The Prince de Polignac added—

"That, in the interest of humanity, and especially in that of the Spanish Colonies, it would be worthy of the European Governments to concert together the means of calming, in those distant and scarcely civilized regions, passions blinded by party spirit; and to endeavour to bring back to a principle of union in government, whether monarchical or aristocratical, people among whom absurd and dangerous theories were now keeping up agitation and disunion."

Mr. Canning, without entering into discussion upon these abstract principles, contented himself with saying—

"That, however desirable the establishment of a monarchical form of government in any of those provinces might be, on the one hand, or whatever might be the difficulties in the way of it, on the other hand, his Government could not take upon itself to put forward as a condition of their recognition."

G. C.

[*465]

*No. 2.

Mr. Canning to Sir W. à Court.(c)

Foreign Office, January 30, 1824.

"Sir,

"THE Messenger Latchford delivered to me, on the 14th instant, your despatch, inclosing a copy of the Count de Ofalia's official Note to you

of the 26th of December last; with the accompanying copy of an instruction, which has been addressed, by order of His Catholic Majesty, to his ambassador at Paris, and to his ministers plenipotentiary at the Courts of Vienna and St. Petersburg.

“Having laid these papers before the King, I have received His Majesty’s commands to direct you to return to them the following answer:—

“The purpose of the Spanish instruction is to invite the several Powers, the allies of his Catholic Majesty, to ‘establish a Conference at Paris, in order that their plenipotentiaries, together with those of His Catholic Majesty, may aid Spain in adjusting the affairs of the revolted countries of America.’

“The maintenance of the ‘Sovereignty’ of Spain over her late colonies, is pointed out in this instruction as one specific object of the proposed Conference; and though an expectation of the employment of force for this object, by the Powers invited to the Conference, is not distinctly disclaimed.

“The invitation contained in this instruction not being addressed directly to the Government of Great Britain, it may not be necessary to observe upon that part of it which refers to the late ‘events in the Peninsula,’ as having ‘paved the way’ for the ‘desired co-operation.’

“The British Government could not acknowledge an appeal founded upon transactions to which it was no party. But no such appeal was necessary. No variation in the internal affairs of Spain has, at any time, varied the King’s desire to see a termination to the evils arising from the protracted struggle between Spain and Spanish America, or His Majesty’s disposition to concur in bringing about that termination.

“From the year 1810, when his Majesty’s single mediation was asked and granted to Spain, to effect a reconciliation with her colonies,—the disturbances in which colonies had then but *newly broken out,—to the year 1818, when the same task, increased in difficulty by [*466] the course and complication of events in America, was proposed to be undertaken by the Allied Powers assembled in Conference at Aix-la-Chapelle,—and from the year 1818 to the present time,—the good offices of His Majesty for this purpose have always been at the service of Spain, within limitations and upon conditions, which have been in each instance explicitly described.

“Those limitations have uniformly excluded the employment of force or of menace against the Colonies on the part of any mediating Power; and those conditions have uniformly required the previous statement by Spain of some definite and intelligible proposition,—and the discontinuance on her part of a system utterly inapplicable to the new relations which had grown up between the American Provinces and other countries.

“The fruitless issue of the Conferences at Aix-la-Chapelle would have deterred the British Government from acceding to a proposal for again entertaining, in Conference, the question of a mediation between Spain and the American Provinces, even if other circumstances had remained nearly the same. But the events which have followed each other with such rapidity during the last five years, have created so essential a differ-

ence, as well in the relative situation in which Spain and the American Provinces stood, and now stand to each other, as in the external relations and the internal circumstances of the Provinces themselves, that it would be vain to hope that any mediation, not founded on the basis of independence, could now be successful.

"The best proof which the British Government can give of the interest which it continues to feel for Spain, is, to state frankly their opinion as to the course most advisable to be pursued by His Catholic Majesty; and to answer, with the like frankness, the question implied in M. Ofallia's instruction, as to the nature and extent of their own relations with Spanish America.

"There is no hesitation in answering this question. The subjects of His Majesty have for many years carried on trade and formed commercial connections in all the American Provinces, which have declared their separation from Spain.

"This trade was originally opened with the consent of the Spanish Government. It has grown gradually to such an extent as to require some direct protection, by the establishment at several ports and places in those Provinces of Consuls on the part of this country—a measure long deferred out of delicacy to Spain, and not resorted to at last without distinct and timely notification to the Spanish Government.

"As to any further step to be taken by His Majesty towards the acknowledgment of the *de facto* Governments of America, the decision must (as has already been stated more than once to Spain and to other Powers) depend upon various circumstances, *and, among others, [*467] upon the reports which the British Government may receive of the actual state of affairs in the several American Provinces.

"But it appears manifest to the British Government, that if so large a portion of the globe should remain much longer without any recognised political existence, or any definite political connexion with the established Governments of Europe, the consequences of such a state of things must be at once most embarrassing to those Governments, and most injurious to the interests of all European nations.

"For these reasons, and not from mere views of selfish policy, the British Government is decidedly of opinion, that the recognition of such of the new States as have established *de facto* their separate political existence, cannot be much longer delayed.

"The British Government have no desire to anticipate Spain in that recognition. On the contrary, it is on every account their wish that His Catholic Majesty should have the grace and the advantage of leading the way, in that recognition, among the Powers of Europe. But the Court of Madrid must be aware, that the discretion of His Majesty in this respect cannot be indefinitely bound up by that of His Catholic Majesty; and that even before many months elapse, the desire now sincerely felt by the British Government, to leave his precedency to Spain, may be overborne by considerations of a more comprehensive nature—considerations regarding not only the essential interests of His Majesty's subjects, but the relations of the old world with the new.

"Should Spain resolve to avail herself of the opportunity yet within

her power, the British Government would, if the Court of Madrid desired it, willingly afford its countenance and aid to a negotiation, commenced on that only basis which appears to them to be now practicable; and would see, without reluctance, the conclusion, through a negotiation on that basis, of an arrangement by which the mother country should be secured in the enjoyment of commercial advantages superior to those conceded to other nations.

“For herself, Great Britain asks no exclusive privileges of trade, no invidious preference, but equal freedom of commerce for all.

“If Spain shall determine to persevere in other counsels, it cannot but be expected that Great Britain must take her own course upon this matter, when the time for taking it shall arrive, of which Spain shall have full and early intimation.

“Nothing that is here stated can occasion to the Spanish Government any surprise.

“In my despatch to Sir Charles Stuart of the 31st of March, 1823, which was communicated to the Spanish Government, the opinion was distinctly expressed, that ‘time and the course of *events had substantially decided the separation of the Colonies from the [*468] mother country, although the formal recognition of those Provinces as Independent States, by his Majesty, might be hastened or retarded by various external circumstances, as well as by the more or less satisfactory progress in each State, towards a regular and settled form of Government.’

“At a subsequent period, in a communication(*d*) made, in the first instance, to France, and afterwards to other Powers,(*e*) as well as to Spain, the same opinions were repeated, with this specific addition—that in either of two cases (now happily not likely to occur)—in that of any attempt on the part of Spain to revive the obsolete interdiction of intercourse with countries over which she has no longer any actual dominion, or in that of the employment of foreign assistance to re-establish her dominion in those countries, by force of arms, the recognition of such new States by His Majesty would be decided and immediate.

“After thus declaring to you, for the information of the Court of Madrid, the deliberate opinion of the British Government on the points on which Spain requires the advice of her allies, it does not appear to the British Cabinet at all necessary to go into a Conference to declare that opinion anew; even if it were perfectly clear, from the tenor of M. Ofalia’s instruction, that Great Britain is in fact included in the invitation to the Conference at Paris.

“Every one of the Powers so invited has been constantly and unservedly apprised, not only of each step which the British Government has taken, but of every opinion which it has formed on this subject: and this despatch will be communicated to them all.

“If those Powers should severally come to the same conclusion with Great Britain, the concurrent expression of their several opinions cannot

(*d*) The Memorandum of Conference, No. 1.

(*e*) Austria, Russia, Prussia, Portugal, the Netherlands, and the United States of America.

have less weight in the judgment of Spain, and must naturally be more acceptable to her feelings, than if such concurrence, being the result of a Conference of Five Powers, should carry the appearance of a concerted dictation.

"If (unhappily, as we think) the allies, or any of them, should come to a different conclusion, we shall at least have avoided the inconvenience of a discussion, by which our own opinion could not have been changed; we shall have avoided an appearance of mystery, by which the jealousy of other parties might have been excited; we shall have avoided a delay, which the state of the question may hardly allow.

[*469] "Meanwhile, this explicit recapitulation of the whole course of our sentiments and of our proceedings on this momentous subject, must at once acquit us of any indisposition to answer the call of Spain for friendly counsel, and protect us against the suspicion of having any purpose to conceal from Spain or from the world.

"I am, &c.,

"GEORGE CANNING.

"The Right Hon. Sir W. à Court, G. C. B., &c., &c., &c."

Note of Mr. Secretary Canning to the Chevalier de Los Rios, relative to Spanish America. (f)

"Foreign Office, March 25, 1825.

"THE undersigned, His Majesty's Principal Secretary of State for Foreign Affairs, is commanded by his Sovereign to deliver to the Chevalier de Los Rios, for the purpose of being transmitted to his Court, the following reply to the official Note, addressed by His Excellency M. Zea to His Majesty's Chargé d'Affaires at Madrid, on the 21st of January.

"So large a portion of the official Note of M. Zea was founded upon a denial of the facts which had been reported to the British Government, with respect to the state of several of the countries of Spanish America, and upon an anticipation of events expected by the Court of Spain to take place in those countries, by which the credibility of the reports transmitted to the British Government would be effectually disproved, that it has been thought advisable to await the issue of the expected events in Spanish America, rather than to confront evidence with evidence, and to discuss probabilities and conjectures.

"Of that issue, decisive as it appears to be, the undersigned is directed to say no more than that it is a great satisfaction to the British Government that it had actually taken place before the intentions of the British Government towards the other countries of Spanish America were announced. Those intentions, therefore, cannot by possibility have had the slightest influence upon the result of the war in Peru.

"With this single observation, the undersigned is directed to pass over all that part of M. Zea's Note which turns upon the supposed incor-

rectness of the information on which the decision of the British Government was founded.

"The questions which remain to be examined, are, whether, in *treating with *de facto* Governments, now established beyond the danger of any external assailment, Great Britain has vio- [*470] lated either any general principle of International Law, or any positive obligation of Treaty.

"To begin with the latter, as the more specific accusation.

"M. Zea brings forward, repeatedly, the general charge of violated Treaties; but as he specifies only two—that of 1809 and that of 1814, it may be presumed that he relies on them alone to substantiate this charge.

"First, as to the Treaty of 1809:—

"That Treaty was made at the beginning of the Spanish struggle against France, and was directed wholly, and in terms not to be misapprehended, to the circumstances of the moment at which it was made. It was a Treaty of Peace, putting an end to the war, in which we had been, since 1804, engaged with Spain. It is expressly described in the first Article as a Treaty of 'Alliance during the War,' in which we were engaged, jointly with Spain against France. All the stipulations of the Treaty had evident reference to the declared determination of the then Ruler of France, to uphold a branch of his own family upon the Throne of Spain and of the Indies; and they undoubtedly pledged us to Spain not to lay down our arms until that design should be defeated in Spain, and the pretension altogether abandoned as to America—a pledge which it is not, and cannot be denied, that Great Britain amply redeemed. But those objects once accomplished, the stipulations of the Treaty were fulfilled, and its obligations necessarily expired, together with the matter to which they related.

"In effect, at the happy conclusion of the war in the Peninsula, and after the restoration, by British assistance, of His Catholic Majesty to the throne of his ancestors, the Treaty of 1809 was replaced by the Treaty of 1814. And what does that Treaty contain?—First, the expression of an earnest wish on the part of His Majesty that Spanish America may be re-united to the Spanish Monarchy; and Secondly, an engagement to prohibit British subjects from supplying the Spanish Americans with munitions of war. This engagement was instantly carried into effect by an Order in Council of 1814. And in furtherance of the like object, beyond the obligation of the Treaty, an Act of Parliament was passed in 1819, prohibiting the service of British subjects in the ranks of the resisting Colonies.

"That the wish expressed in this Treaty was sincere, the proof is to be found, not only in the measures above-mentioned, but in the repeated offers of Great Britain to mediate between Spain and her colonies. Nor were these offers of mediation, as M. de Zea alleges, uniformly founded on the single basis of the admission by Spain of the independence of the Spanish provinces.

*"Years had elapsed, and many opportunities had been missed, of negotiating on better terms for Spain, before that basis was [*471]

assumed to be the only one on which negotiation could be successfully opened.

"It was not assumed in 1812, when our mediation was offered to the Cortes.

"It was not assumed in 1815, when Spain asked our mediation, but refused to state the terms to which she was willing to agree.

"It was not assumed in 1818, in the Conferences at Aix-la-Chapelle, in which Conferences the question of an arrangement between Spain and her Americas was, for the first and last time, discussed between the Great Powers of Europe.

"After the silence, indeed, which Spain observed, as to the opinion of the Powers assisting at those Conferences, when laid before her, two things became perfectly clear; the First, that Spain had, at that time, no serious intention of offering any terms, such as the Spanish American Provinces were likely to accept; the Second, that any subsequent reference of the subject to a Congress must be wholly fruitless and unsatisfactory. From that time forth, Great Britain abstained from stirring the subject of negotiation with the Colonies, till, in the month of May, 1822, Spain spontaneously announced to Great Britain that she had measures in contemplation for the pacification of her Americas, on a basis entirely new, which basis, however, was not explicitly described.

"In answer to that notification, Spain was exhorted by Great Britain to hasten, as much as possible, her negotiation with the Colonies, as the course of events was evidently so rapid as not to admit of a much longer delay;—but no suggestion was even then brought forward by Great Britain as to the adoption of the basis of independence.

"The first suggestion of that basis came, in fact, from the Government of Spain itself, in the month of November, 1822, when the British Minister at Madrid received an intimation that the Cortes meditated opening negotiations with the Colonies, *on the basis of Colonial Independence*—negotiations which were in fact subsequently opened, and carried to a successful termination, with Buenos Ayres, though they were afterwards disavowed by His Catholic Majesty.

"It was not till after this last-mentioned communication from the Spanish Government, that Great Britain expressed the opinion which she entertained, as to the hopelessness of negotiating upon any other basis than that then first suggested by the Spanish Government.

"This opinion, stated, (as has been said) in the first instance, confidentially to Spain, was, nearly a twelvemonth afterwards, that is to say, in [472] the month of October, 1823, mentioned by the *undersigned, in a Conference with the French Ambassador in London, the substance of which Conference was communicated to Spain, and to other Powers. It was repeated and enforced in the despatch from the undersigned to Sir William à Court, in January, 1824.

"Nothing, therefore, can be less exact than the supposition that Great Britain has uniformly put forward the basis of Independence as the *sine quâ non* condition of her counsel and assistance to Spain, in negotiation with her colonies.

"To come now to the Second Charge against Great Britain,—the

alleged violation of general International Law. Has it ever been admitted as an axiom, or ever been observed by any nation or Government as a practical maxim, that no circumstances, and no time, should entitle a *de facto* Government to recognition?—or should entitle Third Powers, who may have a deep interest in defining and establishing their relations with a *de facto* Government, to do so?

“Such a proceeding on the part of Third Powers, undoubtedly does not decide the question of right against the mother country.

“The Netherlands had thrown off the supremacy of Spain long before the end of the sixteenth century; but that supremacy was not formally renounced by Spain till the Treaty of Westphalia in 1648. Portugal declared, in 1640, her independence of the Spanish Monarchy; but it was not till 1668, that Spain, by Treaty, acknowledged that independence.

“During each of these intervals, the abstract rights of Spain may be said to have remained unextinguished. But Third Powers did not, in either of these instances, wait the slow conviction of Spain, before they thought themselves warranted to establish direct relations, and even to contract intimate alliances with the Republic of the United Netherlands, as well as with the new monarchy of the House of Braganza.

“The separation of the Spanish Colonies from Spain, has been neither our word nor our wish. Events, in which the British Government had no participation, decided that separation,—a separation which, we are still of opinion, might have been averted, if our counsels had been listened to in time. But, out of that separation grew a state of things, to which it was the duty of the British Government (in proportion as it became the plain and legitimate interest of the nation whose welfare is committed to its charge) to conform its measures, as well as its language, not hastily and precipitately, but with due deliberation and circumspection.

“To continue to call that a possession of Spain, in which all Spanish occupation and power had been actually extinguished and effaced, could render no practical service to the mother country; but it would have risked the peace of the world. For all political communities are responsible to other political communities *for their conduct; that is, [*473] they are bound to perform the ordinary international duties, and to afford redress for any violation of the rights of others by their citizens and subjects.

“Now either the mother country must have continued responsible for acts, over which it could no longer exercise the shadow of a control, or the inhabitants of those countries, whose independent political existence was, in fact, established, but to whom the acknowledgment of that independence was denied, must have been placed in a situation, in which they were either wholly irresponsible for all their actions, or were to be visited, for such of those actions, as might furnish ground of complaint to other nations, with the punishment due to pirates and outlaws.

“If the former of these alternatives,—the total irresponsibility of unrecognized States,—be too absurd to be maintained;—and if the latter,—the treatment of their inhabitants as pirates and outlaws,—be too monstrous to be applied, for an indefinite length of time, to a large portion

of the habitable globe, no other choice remained for Great Britain, or for any country having intercourse with the Spanish American Provinces, but to recognize, in due time, their political existence as States, and thus to bring them within the pale of those rights and duties which civilized nations are bound mutually to respect, and are entitled reciprocally to claim from each other.

“The example of the late Revolution in France, and of the ultimate happy restoration of His Majesty, Louis XVIII, is pleaded by M. Zea in illustration of the principle of unextinguishable right in a legitimate Sovereign, and of the respect to which that right is entitled from all foreign Powers; and he calls upon Great Britain, in justice to her own consistency, to act with same reserve towards the new States of Spanish America, which she employed, so much to her honour, towards revolutionary France.

“But can M. Zea need to be reminded, that every Power in Europe, and specifically Spain amongst the foremost, not only acknowledged the several successive Governments, *de facto*, by which the House of Bourbon was first expelled from the throne of France, and afterwards kept for near a quarter of a century out of possession of it, but contracted intimate alliances with them all; and, above all, with that which M. Zea justly describes as the strongest of *de facto* Governments,—the Government of Bonaparte, against whom, not any principle of respect for the rights of legitimate monarchy, but his own ungovernable ambition, finally brought combined Europe into the field?

“There is no use in endeavouring to give a specious colouring to facts which are now the property of history.

“The undersigned is, therefore, compelled to add, that Great Britain herself cannot justly accept the praise which M. Zea is willing to ascribe to her in this respect; nor can she claim to be *altogether ex-
[*474] empted from the general charge of having treated with the Powers of the French Revolution.

“It is true indeed, that up to the year 1796, she abstained from treating with revolutionary France, long after other Powers of Europe had set her the example. But the reasons alleged in Parliament, and in State Papers, for that abstinence, was the unsettled state of the French Government. And it cannot be denied that, both in 1796 and 1797, Great Britain opened a negotiation for peace with the Directory of France—a negotiation, the favourable conclusion of which would have implied a recognition of that form of Government; that in 1801, she made peace with the Consulate; that if, in 1806, she did not conclude a Treaty with Bonaparte, Emperor of France, the negotiation was broken off merely on a question of terms; and that if, from 1808 to 1814, she steadily refused to listen to any overtures from France, she did so, declaredly and notoriously, on account of Spain alone, whom Bonaparte pertinaciously refused to admit as party to the negotiation.

“Nay, further, it cannot be denied that, even in 1814, the year in which the Bourbon Dynasty was eventually restored, peace would have been made by Great Britain with Bonaparte, if he had not been unreasonable in his demands; and Spain cannot be ignorant that, even after

Bonaparte was set aside, there was question among the allies of the possible expediency of placing some other than a Bourbon on the throne of France.

“The appeal, therefore, to the conduct of the Powers of Europe, and even to that of Great Britain herself, with respect to the French Revolution, does but recall abundant instances of the recognition of *de facto* Governments; by Great Britain, perhaps, later and more reluctantly than by others, but by Great Britain herself, however reluctant, after the example set to her by the other Powers of Europe, and specifically by Spain.

“There are two other points in M. Zea’s Note, which appear to call for particular observation.

“M. Zea declares, that the King of Spain will never recognize the new States of Spanish America, and that His Majesty will never cease to employ the force of arms against his rebellious subjects in that part of the world.

“We have neither the pretension nor the desire to control His Catholic Majesty’s conduct; but this declaration of M. Zea comprises a complete justification of our conduct, in having taken the opportunity which, to us, seemed ripe for placing our relations with the new States of America on a definite footing. For this declaration plainly shows, that the complaint against us is not merely as to the mode, or the time of our advances towards those States; it shows that the dispute between us and Spain is not merely as to the question of fact, whether the internal condition *of any of those States be such as to justify the entering [*475] into definite relations with them; that it was not merely a reasonable delay for the purpose of verifying contradictory reports, and of affording opportunity for friendly negotiation, that was required of us; it shows that no extent of forbearance on our part would have satisfied Spain; and that, defer our advances towards the New States as long as we might, we should still have had to make them without the consent of Spain; for that Spain is determined against all compromise, under any circumstances and at any time, and is resolved upon interminable war with her late colonies in America.

“M. Zea concludes with declaring, that His Catholic Majesty will protest, in a most solemn manner, against the measures announced by the British Government, as violating existing Treaties, and the imprescriptible rights of the throne of Spain.

“Against what will Spain protest?

“It has been proved that no Treaties are violated by us; and we admit that no question of right is decided, by our recognition of the new States of America.

“But if the argument upon which this declaration is founded be true, it is eternal; and the offence of which we are guilty, in placing our intercourse with those countries under the protection of Treaties, is one of which no time and no circumstances could, in the view of Spain have mitigated the character.

“Having thus entered, with great pain and unwillingness, into the several topics of M. Zea’s Note, the undersigned is directed, in conclusion,
 NOVEMBER, 1855.—21

sion, to express the anxious hope of his Government, that a discussion, now wholly without object, may be allowed here to close. The undersigned is directed to declare to the Spanish Minister, that no feelings of ill-will, or even of indifference, to the interests of his Catholic Majesty, has prompted the steps which His Majesty's Government has taken,—that His Majesty still cherishes an anxious wish for the welfare of Spain,—and that His Majesty still retains the disposition, and commands the undersigned again to renew to His Catholic Majesty's Government the offer, to employ His Majesty's good offices, for the bringing about of any amicable arrangement which may yet be practicable, between His Catholic Majesty and the countries of America which have separated themselves from Spain.

“The undersigned, &c.,

“GEORGE CANNING.

“*The Chevalier de Los Rois.*”

[*476]

*No. 3.

Reply of Mr. Secretary Canning to a Letter of M. Radios relative to the “Russian Memoir on the Pacification of Greece.”(g)

Foreign Office, December 1st, 1824.

“Sir,

“I HAVE to acknowledge the receipt of the letter which you did me the honour to address to me on the $\frac{1}{2}$ ²₄th of August (but which reached my hands only on the 4th of November,) expressing the opinion of the Greek Provisional Government upon a paper which has been published in the Gazettes of Europe, purporting to be a Plan of Pacification for Greece, drawn up by the Court of St. Petersburg.

“That the publication of the paper in question is unauthorized, cannot be doubted. Whether the paper itself be authentic, it is not for me to admit or to deny: but it is due to the Court of St. Petersburg, to declare to you, that any plan of pacification, emanating from that Court, would be drawn up (as the British Government sincerely believe) in anything but an unfriendly disposition towards Greece; that no such plan has been definitely settled (as your letter appears to assume) with the intention of imposing it either upon Greece or upon the Turkish Government: and that whatever plan the Emperor of Russia might have in contemplation, would be submitted by His Imperial Majesty to several of the Powers of Europe, His Imperial Majesty's allies, for their consideration, before any proposition founded thereupon would be made to the contending parties. The Emperor of Russia had, it is true, suggested to his allies the expediency of proposing, simultaneously to the Porte and to the Provisional Government of Greece, a suspension of hostilities, for the purpose of allowing time for an amicable intervention between them. Nor would the British Government have refused, at a proper time, to be party to that proposal.

“It is but just to add, that the paper which has attracted the indig-

nation of the Greek Provisional Government, has been viewed with no less indignation by the Divan.

“While the Greeks profess an insurmountable abhorrence of any settlement, short of the establishment of their independence as a nation, the Divan abjures all modes of reconciliation, short of an unqualified re-establishment of their sovereignty over Greece.

“Between two parties so disposed, there can, indeed, be little hope of an acceptable and successful mediation. But to have felt and expressed a desire to mediate, before the extreme vehemence *of these opposite resolutions was known, and while the varying fortune of the [*477] war appeared to furnish to both parties not unreasonable motives for a compromise, surely cannot be imputed, either to Russia, if she originated the project of such a compromise, or to those who might have been prepared to deliberate in concert with her upon it, as a crime.

“The paper, purporting to be a Russian memoir, contains the elements of a compromise, though not adjusted, perhaps, exactly in the proportions in which they might finally have been arranged for proposal to the belligerent parties.

“If the sovereignty of the Turks were not to be absolutely restored, nor the independence of the Greeks to be absolutely acknowledged (to propose either of which extremes would have been, not to mediate, but to take a decided part in the contest,) there was necessarily no other choice than to qualify, in some mode and degree, the sovereignty of the one and the independence of the other; and the mode and degree of that qualification seemed to constitute the question for inquiry and deliberation.

“Either party, no doubt, had it in its power to defeat any plan of compromise, however rational in its principles or impartial in its provisions. And the previous knowledge that both parties would concur in rejecting any plan of compromise that could be devised, renders, any hope of successful intervention, at the present moment, utterly vain.

“On the remainder of your letter, which, in effect, calls upon the British Government to take part with the Greeks in the struggle for their independence, comparing their merits and claims with those of the Provinces of Spanish America, which have separated themselves from the mother country, I have only to observe, that, with respect to the contest between Spain and the several countries of Spanish America, Great Britain has professed and maintained a strict neutrality; and that the like neutrality has been observed by Great Britain in the contest now raging in Greece. The belligerent rights of the Greeks have been uniformly respected; and if the British Government has found itself compelled, on a recent occasion, to repress the excess to which certain of those rights were attempted to be carried, the British Government is satisfied that such a necessity will not occur again.

“The Provisional Government of Greece may rely upon the continuance of the same scrupulous neutrality. They may be assured, not only that Great Britain would not be concerned in any attempt (if such attempt were in contemplation) to force upon them a plan of pacification contrary to their wishes, but that, if they should at any time hereafter

think it fit to solicit our mediation, we should be ready to tender it to the Porte, and, if accepted by the Porte, to do our best to carry it into effect, conjointly with other Powers, whose co-operation would at once [*478] *give facility to any arrangement, and afford the best security for its duration.

"This appears to the British Government all that can reasonably be asked of them. They cannot accuse themselves of having in any way, directly or indirectly, instigated the commencement of the Greek enterprise, nor of having in any way interfered in its progress.

"Connected with the Porte by established relations of amity, and by the ancient obligations of Treaties, which the Porte has not violated, it surely cannot be expected that England should engage in unprovoked hostilities against that Power in a quarrel not her own.

"I trust, Sir, that the exposition which I have thus the honour to address to you, will be considered as affording sufficient answer to any suspicions or imputations which error or intrigue may have propagated against the intentions of the British Government towards Greece, and will be accepted as a proof, at once of the purity of our views, and of the frankness with which we are ready to declare them.

"I am, &c.,

"GEORGE CANNING.

"*The Secretary of the Provisional
Government of Greece.*"

No. 4.

"*Protocole de la Conférence tenue au Foreign Office, le 19 Février
1831.(h)*

"PRESENS :—Les Plénipotentiaires d'Autriche, de France, de la Grande Bretagne, de Prusse, et de Russie.

"Les Plénipotentiaires des Cours d'Autriche, de France, de la Grande Bretagne, de Prusse, et de Russie, s'étant assemblés, ont porté toute leur attention sur les interprétations diverses données au Protocole de la Conférence de Londres, en date du 20 Décembre, 1830, et aux principaux Actes dont il a été suivi. Les délibérations des Plénipotentiaires les ont conduits à reconnaître unanimement, qu'ils doivent à la position des Cinq Cours, comme à la cause de la paix générale, qui est leur propre cause, et celle de la civilisation Européenne, de rappeler ici le grand principe de droit public, dont les Actes de la Conférence de Londres n'ont fait qu'offrir une application salubre et constante.

*[*479] "D'après ce principe d'un ordre supérieur, les Traités ne perdent pas leur puissance, quels que soient les changemens qui interviennent dans l'organisation intérieure des peuples. Pour juger de l'application que les Cinq Cours ont faite de ce même principe, pour

(h) Protocols of Conferences in London relative to Belgium, 1830-1, part i. No. 19, pp. 59-65.

apprécier les déterminations qu'elles ont prises relativement à la Belgique, il suffit de se reporter à l'époque de l'année 1814.

“ A cette époque les Provinces Belges étaient occupées militairement par l'Autriche, la Grande Bretagne, la Prusse, et la Russie; et les droits que ces Puissances exerçaient sur elles furent complétés par la renonciation de la France à la possession de ces mêmes Provinces. Mais la renonciation de la France n'eut pas lieu au profit des Puissances occupantes. Elle tint à une pensée d'un ordre plus élevé. Les Puissances, et la France elle-même, également désintéressées alors comme aujourd'hui, dans leur vues sur la Belgique, en gardèrent la disposition et non la souveraineté, dans la seule intention de faire concourir les Provinces Belges à l'établissement d'un juste équilibre en Europe, et au maintien de la paix générale. Ce fut cette intention qui présida à leurs stipulations ultérieures; ce fut elle qui unit la Belgique à la Hollande; ce fut elle qui porta les Puissances à assurer dès-lors aux Belges le double bienfait d'institutions libres, et d'un commerce fécond pour eux en richesse et en développement d'industrie.

“ L'union de la Belgique avec la Hollande se brisa. Des communications officielles ne tardèrent pas à convaincre les Cinq Cours que les moyens primitivement destinés à la maintenir, ne pourraient plus ni la rétablir pour le moment, ni la conserver par la suite; et que désormais, au lieu de confondre les affections et le bonheur des deux peuples, elle ne mettrait en présence que les passions et les haines, elle ne ferait jaillir de leur choc que la guerre avec tous ses désastres. Il n'appartenait pas aux Puissances de juger des causes qui venaient de rompre les liens qu'elles avaient formés. Mais quand elle voyaient ces liens rompus, il leurs appartenait d'atteindre encore l'objet qu'elles s'étaient proposé en les formant.

“ Il leur appartenait d'assurer, à la faveur de combinaisons nouvelles, cette tranquillité de l'Europe, dont l'union de la Belgique avec la Hollande avait constitué une des bases. Les Puissances y étaient impérieusement appelées. Elles avaient le droit, et les évènements leur imposaient le devoir, d'empêcher que les Provinces Belges, devenues indépendantes, ne portassent atteinte à la sécurité générale, et à l'équilibre Européen.

“ Un tel devoir rendait inutile tout concours étranger. Pour agir ensemble, les Puissances n'avaient qu'à consulter leurs Traités, qu'à mesurer l'étendue des dangers que leur inaction ou leur désaccord aurait fait naître. Les démarches des Cinq Cours à l'effet d'amener la cessation de la lutte entre la Hollande et la Belgique, et leur ferme résolution de mettre fin à toute mesure qui, de part ou d'autre, aurait eu un caractère hostile, furent les premières conséquences de l'identité de leurs opinions sur la valeur est les principes des transactions solennelles qui les lient. [*480]

“ L'effusion du sang s'arrêta; la Hollande, la Belgique, et même les Etats voisins, leur sont également redevables de ce bienfait.

“ La seconde application des mêmes principes eut lieu dans le Crotole du 20 Décembre, 1830.

“ A l'exposé des motifs qui déterminaient les Cinq Cours, cet Acte

associa la réserve des devoirs dont la Belgique resterait chargée envers l'Europe, tout en voyant s'accomplir ses vœux de séparation et d'indépendance.

“Chaque nation a ses droits particuliers ; mais l'Europe aussi a son droit—c'est l'ordre social qui le lui a donné.

“Les Traités qui régissent l'Europe, la Belgique devenue indépendante, les trouvait faits et en vigueur. Elle devait donc les respecter, et ne pouvait pas les enfreindre. En les respectant, elle se conciliait avec l'intérêt et le repos de la grande communauté des Etats Européens. En les enfreignant, elle eut amené la confusion et la guerre. Les Puissances seules pouvaient prévenir ce malheur, et puisqu'elles le pouvaient, elles le devaient. Elles devaient faire prévaloir la salubre maxime, que les événemens qui font naître en Europe un Etat nouveau, ne lui donnent pas plus le droit d'altérer le système général, dans lequel il entre, que les changemens survenus dans la condition d'un Etat ancien, ne l'autorisent à se croire délié de ses engagements antérieurs. Maxime de tous les peuples civilisés ; maxime qui se rattache au principe même d'après lequel les Etats survivent à leurs Gouvernemens, et les obligations imprescriptibles des Traités, à ceux qui les contractent ; maxime, enfin, qu'on n'oublierait pas, sans faire rétrograder la civilisation, dont la morale et la foi publiques sont heureusement et les premières conséquences, et les premières garanties.

“Le Protocole du 20 Décembre fut l'expression de ces vérités : il statua, ‘Que la Conférence s'occuperait de discuter et de concerter les nouveaux arrangements les plus propres à combiner l'indépendance future de la Belgique avec les stipulations des Traités, avec les intérêts et la sécurité des autres Etats, et avec la conservation de l'équilibre Européen.’

“Les Puissances venaient d'indiquer ainsi le but auquel elles devaient marcher. Elles y marchèrent fortes de la pureté de leurs intentions, et de leur impartialité. Tandis que, d'un côté, par leur Protocole du 18 Janvier, elles repoussaient des prétentions qui seront toujours inadmissibles, de l'autre, elles pesaient avec le soin le plus scrupuleux toutes les opinions qui étaient mutuellement émises, tous les titres qui étaient réciproquement invoqués. De cette discussion, approfondie des diverses communications faites par les Plénipotentiaires de Sa Majesté le Roi des Pays-Bas, et par les Commissaires Belges, résulta le Protocole définitif du 20 Janvier, 1831.

[*481] “Il était à prévoir que la première ardeur d'une indépendance naissante, tenderait à franchir les justes bornes des Traités et des obligations qui en dérivent. Les Cinq Cours ne pouvaient néanmoins admettre en faveur des Belges le droit de faire des conquêtes sur la Hollande, ni sur d'autres Etats. Mais obligées de résoudre des questions de territoire, essentiellement en rapport avec leurs propres Conventions et leurs propres intérêts, les Cinq Cours ne consacrèrent, à l'égard de la Belgique, que les maximes dont elles s'étaient faites à elles-mêmes une loi rigoureuse.

“Assurément elles ne sortaient ni des bornes de la justice et de l'équité, ni des règles d'une saine politique, lorsqu'en adoptant impartialement les limites qui séparaient la Belgique de la Hollande avant leur réunion, elles

ne refusaient aux Belges que le pouvoir d'envahir : ce pouvoir elles ont rejeté, parcequ'elles le considèrent comme subversif de la paix et de l'ordre social.

“ Les Puissances avaient encore à délibérer sur d'autres questions qui se rattachaient à leurs Traités, et qui ne pouvaient par conséquent être soumises à des décisions nouvelles, sans leur concours direct.

D'après le Protocole du 20 Décembre, les Instructions et les Pleins Pouvoirs demandés pour les Commissaires Belges qui seraient envoyés à Londres, devaient embrasser tous les objets de la négociation. Cependant, ces Commissaires arrivèrent sans autorité suffisante, et, sur plusieurs points importants, sans informations ; et les circonstances n'admettaient point de retard.

“ Les Puissances, par le Protocole du 27 Janvier, ne firent néanmoins d'une part qu'énumérer les charges inhérentes, soit au Territoire Belge, soit au Territoire Hollandais, et se bornèrent à *proposer* de l'autre, des arrangemens fondés sur une réciprocité de concessions, sur les moyens de conserver à la Belgique les marchés qui ont le plus contribué à sa richesse, et sur la notoriété même des Budgets publics du Royaume des Pays-Bas.

“ Dans ces arrangemens la médiation des Puissances sera toujours requise ; car, sans elle, ni les parties intéressées ne parviendraient à s'entendre, ni les stipulations auxquelles les Cinq Cours ont pris en 1814 et 1815 une part immédiate, ne pourraient se modifier.

“ L'adhésion de Sa Majesté le Roi des Pays-Bas aux Protocoles du 20 et du 27 Janvier, 1831, a répondu aux soins de la Conférence de Londres.

“ Le nouveau mode d'existence de la Belgique, et sa neutralité reçurent ainsi une sanction dont ils ne pouvaient se passer. Il ne restait plus à la Conférence que d'arrêter ses résolutions relatives à la protestation faite en Belgique contre le premier de ces Protocoles, d'autant plus important qu'il est fondamental.

“ Cette protestation invoque d'abord un droit de *post-liminie* qui n'appartient qu'aux Etats indépendans, et qui ne saurait par conséquent appartenir à la Belgique, puisqu'elle n'a jamais été *comptée au nombre de ces Etats. Cette même protestation mentionne en [*482] outre des cessions faites à une Puissance tierce, et non à la Belgique, qui ne les a pas obtenus, et qui ne peut s'en prévaloir.

“ La nullité de semblables prétentions est évidente. Loin de porter atteinte au Territoire des anciennes Provinces Belges, les Puissances n'ont fait que déclarer et maintenir l'intégrité des Etats qui l'avoisinent. Loin de resserrer les limites de ces Provinces, elles y ont compris la Principauté de Liège, qui n'en faisait point partie autrefois.

“ Du reste, tout ce que la Belgique pouvait désirer, elle l'a obtenu : séparation d'avec la Hollande, indépendance, sûreté extérieure, garantie de son Territoire et de sa neutralité, libre navigation des fleuves qui lui servent de débouchés, et paisible jouissance de ses libertés nationales.

“ Tels sont les arrangemens auxquels la protestation dont il s'agit, oppose le dessein, publiquement avoué, de ne respecter ni les possessions ni les droits des Etats limitrophes.

“ Les Plénipotentiaires des Cinq Cours, considérant que de pareilles

vues sont des vues de conquête, incompatibles avec les Traités existans, avec la paix de l'Europe, et par conséquent avec la neutralité et l'indépendance de la Belgique, déclarent :—

“1°. Qu'il demeure entendu, comme il l'a été dès l'origine, que les arrangemens arrêtés par le Protocole du 20 Janvier, 1831, sont des arrangemens fondamentaux et irrévocables.

“2°. Que l'indépendance de la Belgique ne sera reconnue par les Cinq Puissances, qu'aux conditions et dans les limites qui résultent des dits arrangemens du 20 Janvier, 1831.

“3°. Que le principe de la neutralité et de l'inviolabilité du Territoire Belge, dans les limites ci-dessus mentionnées, reste en vigueur, et obligatoire pour les Cinq Puissances.

“4°. Que les Cinq Puissances, fidèles à leurs engagemens, se reconnaissent le plein droit de déclarer, que le Souverain de la Belgique doit répondre par sa position personnelle au principe d'existence de la Belgique même, satisfaire à la sûreté des autres États, accepter sans aucune restriction, comme l'avait fait Sa Majesté le Roi des Pays-Bas par le Protocole du 21 Juillet, 1814, tous les arrangemens fondamentaux renfermés dans le Protocole du 20 Janvier, 1831, et être à même d'en assurer aux Belges la paisible jouissance.

“5°. Que ces premières conditions remplies, les Cinq Puissances continueront d'employer leurs soins et leurs bons offices pour amener l'adoption réciproque et la mise à exécution des autres arrangemens nécessités par la séparation de la Belgique d'avec la Hollande.

“6°. Que les Cinq Puissances reconnaissent le droit, en vertu duquel les autres États prendraient telles mesures qu'ils jugeraient nécessaires, [483] pour faire respecter ou pour rétablir leur *autorité légitime dans tous les pays à eux appartenans sur lesquels la protestation mentionnée plus haut élève des prétentions, et qui sont situées hors du Territoire Belge déclaré neutre.

“7°. Que Sa Majesté le Roi des Pays-Bas ayant adhéré, sans restriction, par le Protocole du 19 Février, 1831, aux arrangemens relatifs à la séparation de la Belgique d'avec la Hollande, toute entreprise des Autorités Belges sur le Territoire que le Protocole du 20 Janvier a déclaré Hollandais, serait envisagé comme un renouvellement de la lutte à laquelle les Cinq Puissances ont résolu de mettre un terme.

“ESTERHAZY,

“TALLEYRAND,

“BULOW,

“LIEVEN WASSENBERG,

“PALMERSTON,

“MATUSZEWIC,”

APPENDIX II. (PAGE 37, CHAP. 5, s. XXXI.)

FRAUDS UPON, AND BREACHES OF FOREIGN MUNICIPAL LAW, NOT COGNIZABLE IN THE COURTS OF ENGLAND, OR IN THE UNITED STATES OF NORTH AMERICA.

No. 1.

THE principle referred to in the text, that a nation which protects the forgers of the coin of another nation, commits an international offence, ought, as Mr. Chitty reasonably remarks in his note upon the passage in Vattel, to be so extended as to deny effect to any fraud upon the Government or subjects of a foreign State. A different rule, however, certainly prevails both in England and in the United States of North America.

As to England, the case usually referred to as that in which a contrary principle was laid down, is *Boucher v. Lawson*, in which the opinion of Lord Hardwicke, then Chief Justice of the King's Bench is thus recorded:—"I think the unlawfulness of the trade makes no difference, for it is not material to us what the law of Portugal is, but what the law of England is; and here in England it is not only a lawful trade, but very much encouraged." (i)

This judgment was delivered in the 9th year of George II.

*No. 2.

[*484]

In the 15th year of George III., the following case was tried in the Court of King's Bench:—(k)

HOLMAN *et al'* versus JOHNSON, *alias* NEWLAND.

"Assumpsit for goods sold and delivered: Plea non-assumpsit and verdict for the plaintiff. Upon a rule to show cause why a new trial should not be granted, Lord Mansfield reported the case, which was shortly this: The plaintiff who was a resident at, and an inhabitant at Dunkirk, together with his partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England. They had however no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade.

Mr. Mansfield, in support of the rule, insisted, that the contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention and purpose was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it. He cited Huberus, vol. ii. pp. 538, 539, and *Robinson v. Bland*, to show that the contract must be judged by the laws of this country, and consequently that an action for the price of the tea could not be supported here.

(i) Cases temp. Hardwicke, p. 198.

(k) Cowper's Reports, pp. 341-5.

“Mr. Dunning, Mr. Davenport, and Mr. Buller, *contra*, for the plaintiff, contended, that the contract being complete by the delivery of the goods at Dunkirk, where the plaintiff might lawfully sell, and the defendant lawfully buy, it could neither directly or indirectly be said to be done in violation of the laws of this country; consequently it was a good and valid contract, and the plaintiff entitled to recover. It was of no moment or concern to the plaintiff what the defendant meant to do with the tea, nor had he any interest in the event. If he had, or if the contract had been that the plaintiff should deliver the tea in England, it would have been a different question; but there was no such undertaking on his part. They pressed the argument *ab inconvenienti*, and cited several cases:—*MSS. at Ni. Pri.* before Lord Mansfield, sittings in London.—An action brought by the plaintiffs, who were lace-merchants in Paris, for laces, (which were contraband in this country) sold and delivered to the defendant's order at Calais. The question made was, whether the vendor of contraband goods at Paris was not bound to run the risk of their being *smuggled into this country. But Lord Mansfield [*485] held, that as the contract on the part of the plaintiff was complete by his delivering the laces at Calais, he was clearly entitled to recover, and the jury found a verdict accordingly.—*Faikney v. Reynous and Richardson*, East, 7 Geo. 3, B. R. since reported in 4 Bur. 2069, and 1 Black. 633, where one partner in a stock-jobbing contract lent the other 1500*l.* to pay his moiety of the differences on the *rescouter* day; and though this was pleaded to the bond, the Court upon demurrer over-ruled the plea, and held the plaintiff was entitled to recover. *Bruston v. Clifford*. In Chan. before Lord Camden, 4th December, 1767. *Alsibrook v. Hall* in C. B. where money paid for the defendant for a gaming debt was held recoverable by the plaintiff.

“Lord Mansfield.—‘There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of instances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.—There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains, are applicable to the present case. For no country ever takes notice of the revenue laws of another.

“ ‘The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defend-

ant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis*.

“ ‘The question therefore is, whether, in this case, the plaintiff’s demand is founded upon the ground of any *immoral* act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country.—An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What *then is the contract of the plaintiff? [*486] It is this; being a resident and inhabitant of Dunkirk, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant’s order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk. Where then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgressed by a person making a compleat sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is compleat, and nothing is left to be done. The seller indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract *compleat* by the *delivery* of the goods at Dunkirk.

“ ‘To what a dangerous extent would this go if it was to be held a crime. If contraband cloaths are bought in France, and brought home hither; or if glass bought abroad, which ought to pay a great duty, is run into England; shall the French taylor or the glass-manufacturer stand to the risk or loss attending their being run into England? Clearly not. Debt follows the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any Act of Parliament.

“ ‘I am very glad the old books have been looked into. The doctrine Huberus lays down, is founded in good sense, and general principles of justice. I entirely agree with him. He puts the very case in question, thus: *Tit. de conflictu legum*, vol. ii. p. 539. “*In certo loco merces quædam prohibitæ sunt. Si vendantur ibi contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia, contractus inde ab initio validus fuit.*” Translated, it might be rendered thus: In England, tea, which has not paid duty, is prohibited; and if sold there the contract is *null* and void. But if sold and *delivered* at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid.—He goes on thus: “*Verum si merces venditæ in altero loco, ubi prohibitæ sunt essent tradendæ, jam non fieret condemnatio, quia repug-*

naret hoc juri et commodo reipublicæ quæ merces prohibuit." Apply this in the same manner.—But if the goods sold were to be *delivered* in England, where they are prohibited, the contract is void, and the buyer [487] shall not be liable in an action for the *price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

" 'The gist of the whole turns upon this,—that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price, and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of this case, from the first to the last, he clearly has offended against no law of England. Therefore let the rule for a new trial be discharged.'

"The three other judges concurred."

No. 3.

In the 4th year of George IV., the following case was decided in the Court of King's Bench :—(l)

JAMES V. CATHERWOOD.—(June, 1823.)

"Assumpsit for money lent. Plea, first, non-assumpsit, and second, the statute of Limitations. At the trial before Abbott, C. J., at the Second Middlesex Sitzings in Easter Term, it appeared that the money in question was lent by plaintiff to defendant in France, in the year 1814, where both parties then resided. To prove the loan, receipts for the money, dated in the year 1817, and signed by the defendant, but not stamped, were tendered in evidence. The defendant's counsel objected to those réceipts as inadmissible, and offered to show, that by the law of France, such receipts required a stamp; but the learned judge being of opinion that they were admissible here, as acknowledgements of the debt, without any stamp, rejected that evidence, and the plaintiff had a verdict.

"Chitty now moved for a new trial, on the ground that the defendant should have been allowed to produce evidence of the law of France, to show that in that country such receipts were not legal without a stamp, and contended that as every contract must be entered into in conformity with the *lex loci*, it was competent to the defendant to show that this contract had not so been entered into. (Best, J.—'Can we take notice of the revenue laws of France?' Abbott, C. J.—'That is the question. In the time of Lord Hardwicke, it became a maxim, that the Courts of this country will not take notice of the revenue laws of a foreign State. There is no reciprocity between nations in this respect. Foreign States [488] do not take any notice of our stamp laws, and why *should we be so courteous to them, when they do not give effect to ours?') There certainly was a dictum of Lord Hardwicke, that an English Court cannot take notice of the revenue laws of a foreign country, but here was

no solemn decision upon that point; which seems rather to have been taken for granted, than grounded on any authority. It is admitted by foreign writers, and others, that though an instrument made in a foreign country, may not be admissible in evidence, yet it does not make it void; but that if any use is to be made of it, evidence must be adduced to show that it has been framed according to the *lex loci*. Upon this principle it is a matter worthy of further consideration, whether it was not competent to the defendant to show that, by the law of France, these receipts would not be binding in that country unless stamped.

“Abbott, C. J.—‘This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke, that in a British Court we cannot take notice of the revenue laws of a foreign State. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid. Nothing must be taken by the motion.’

“Holroyd, J.(m) and Best, J. concurred.

“Rule refused.”

No. 4.

It is difficult to strive against the authority of Hardwicke, Mansfield, and Tenterden, but the international jurist must lament that a more liberal view of international obligations, by way of comity at least, has not been taken by these great luminaries of the English law. And it is right to add that the authority of Stowell supports a case of gross fraud upon an enemy which it is difficult to reconcile with the laxest views of belligerent morality. The case is as follows:—

CASE OF THE LONDON.(n)

“This was also the case of a British ship and cargo, captured by an American privateer, the captain of which offered to restore the ship and cargo to the master, on condition of his drawing a bill for 1,000*l.*, payable in London. The master accepted the restitution on these terms, and accordingly drew a bill to that amount; but took care to send advices to London in time to *prevent payment of it. A demand [*489] was now made by him for salvage on the cargo, as recaptured from the enemy. The value of the cargo was stated to be from 1,500*l.* to 2,000*l.*

“The Court gave him one-tenth and his expenses.”

No. 5.

To these cases it should be added that it was actually held in the case of *Smith v. Marconnay*,(o) “that the maker of paper in England, know-

(m) Bayley, J., was absent.

(n) 2 Dodson's Admiralty Reports, 74.

(o) 2 Peake's Reports, 81.

ingly made by him for the purpose of forging assignats upon the same, to be exported to France in order to commit frauds there on other persons, might recover damages for not accepting such paper pursuant to contract."

The same doctrine has been held by the American Courts in various cases. In the *Santissima Trinidad*, Mr. Justice Story says—"The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a bona fide sale, (and there is nothing in the evidence before us to contradict it,) there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after the sale was for that cause alone, invalid."(*p*)

A similar doctrine has been laid down in other cases. But Dr. Story, in his Commentaries on the Conflict of Laws, speaking as a jurist, reprobates, with Pothier, the principle of these decisions. Dr. Story says—"It might be different according to the received, although it should seem upon principle indefensible, doctrine of judicial tribunals, if the contract were made in some other country, or in the foreign country to which the parties belong; for (as has been seen) it has been long laid down as a settled principle, that no nation is bound to protect, or to regard the revenue laws of another country; and, therefore, a contract *made [**490*] in one country by subjects or residents there to evade the revenue laws of another country, is not deemed illegal in the country of its origin. Against this principle Pothier(*q*) has argued strongly as being inconsistent with good faith and the moral duties of nations. Valin, (*r*) however, supports it; and Emérigon(*s*) defends it, upon the unsatisfactory ground, that smuggling is a vice common to all nations. An enlightened policy, founded upon national justice as well as national interest, would seem to favour the opinion of Pothier in all cases where positive legislation has not adopted the principle as a retaliation upon the narrow and exclusive revenue system of another nation. The contrary doctrine seems, however, firmly established in the actual practice of modern nations, without any such discrimination, too firmly, perhaps, to be shaken, except by some legislative act abolishing it."(*t*)

(*p*) 7 Wheaton's (Amer.) Reports, 340.

(*q*) Pothier, Assur. n. 58.

(*r*) 2 Valin Comn. art. 49, p. 127.

(*s*) Emérigon, c. 8, s. 5, pp. 212, 215.

(*t*) Story, Conflict of Laws, c. viii. s. 257, p. 333.

The passage in Pothier to which Dr. Story refers, is as follows :—

“ Lorsque l’arrêt a été fait pour cause de contrebande, et que les marchandises assurées s’étant trouvées de contrebande ont été confisquées, cette perte doit-elle tomber sur les assureurs? Par exemple, un négociant François a fait charger en Espagne clandestinement des marchandises de soierie, contre les loix d’Espagne, qui en défendent l’exportation : le vaisseau a été arrêté par les Officiers du Roi d’Espagne, et les marchandises confisquées, comme étant chargées en contrebande. Les assureurs sont-ils tenus de cette perte? Vasin tient l’affirmative, pourvu que les assureurs aient eu connoissance que les marchandises qu’on a fait assurer étoient de contrebande : car s’ils l’avoient ignoré, il n’est pas douteux, en ce cas, qu’ils n’en seroient pas tenus : ils ne pourroient pas être censés s’être soumis au risque de la confiscation pour cause de contrebande, n’ayant pas de connoissance que les marchandises fussent de contrebande.”^(u)

It appears that the Judicial Tribunal in Prussia do, to their great credit be it said, hold that a contract relating to the smuggling into a foreign country of goods prohibited by the revenue laws of that country, is illegal and invalid, as being *contra bonos mores* (*guten Sitten zuwider*.) —Heffters, Das Europäische Völkerrecht der Gegenwart, § 31, n. 21.

*APPENDIX III. (PAGE 79. CHAP. 8.) [*491]

TREATIES—INTERPRETATION OF.

No. 1.

Interpretatio § 4. *Pacis Monasteriensis*, 30 Januar. 1648.^(x)

“ LONGUM esset exponere, quæ Pontificiorum fuerit conditio in Belgio Fœderato ab initio Reipublicæ ad hæc usque tempora. Ne quidem animus est commemorare, quæ in Imperio Ordinum Generalium, et quæ in singulis Provinciis contra solos Ecclesiasticos, qui Pontifici Romano adsurgunt, constituta et decreta sunt. In rem nostram sufficit scire, ut Laicis Pontificiis in Belgio Fœderato libere morari semper licuit, ita Clericis, etiam ante pacem Monasteriensem, non licuisse. Jesuitis quidem, qui in Belgio Fœderato invenirentur, 600, florenorum mulctam Ordines Generales constituerunt in Edictis 26 Febr., 1622, 8 Sept., 1692, et 30 Aug., 1641, ceteris omnibus Ecclesiasticis Belgio Fœderato simpliciter interdicto, exceptis duotaxat iis, qui ante annum 1722, hic habitassent, dummodo intra dies octo nomina sua ad Magistratum loci, ubi degunt, deferrent, et secundum leges Ordinum viverent.

“ Recte se habebant ea Edicta tempore belli Hispanici, quo facta sunt, sed quæro, an recte se habeat Edictum, quod Ordines Generales post pacem Monasteriensem promulgarunt 14 Apr. 1649, quo priora illa

^(u) Pothier, Œuvres de Traité du Contrat d’Assurance, t. iii. c. i. sect. 2, art. 2, s. 2, p. 58.

^(x) Bynkershoek, Quæstiones Juris Publici, lib. ii. cap. 20.

Edicta, quorum sententiam retuli, repetita et servari jussa sunt? vel potius quæro, an non sæviora illa Edicta restringi et temperari debeant quod ad Ecclesiasticos, qui ex Imperio Regis Hispaniarum, Belgio forte tunc Hispanico, nunc Austriaco, hic adsunt? Quæstionem facit § 4, Pacis Monasteriensis 30 Jan. 1648, quo inter Regem Hispaniarum et Ordines Generales convenit, ut olim quoque convenerat § 4, Induciarum 9 Apr. 1609, alterius subditis et incolis, absque ullo personarum discrimine, in alterius Imperium recte licere advenire, ibi manere et agere, et commercia sua exercere. Verba Belgice sic habent: *de Ondersaten en inwoonderen van de Landschappen van de voorschr. Heeren Coning en Staten zullen ook mogen komen en blyven in de Landschappen de een van de andere, en daar doen hare trafique en commescie in alle versektheid, zoo ter Zee, andere Wateren, als te Lande.*

“Sane plerique Belgæ Fœderati videntur credidisse, salva ea pace, duriora illa Edicta explicari non posse, atque ita Ecclesiasticis Pontificiis omnino prodesse *d.* § 4. Gelri quidem, et Hollandi, et Frisii, et Groningani in extraordinariis Ordinum *Generalium Comitiis, proxime [*492] post illam pacem habitis anno 1650, et 1651, proposuerunt, exercerentur Ordinum Edicta contra effrenem Ecclesiasticorum in has Regionem veniendi licentiam, sed hoc nominatim addito, *quatenus salva pace fieri posset*, cujus nomine non aliam, quam illam Monasteriensem, intelligo, et ita quoque, addita hac ipsa clausula, Ordines Generales decreverunt 27 Jan. 1651. Quia autem illa clausula parum certitudinis habebat, idcirco in iisdem Comitiis mense Apr. 1651, propositum est, habita ratione eorum, quæ tempore induciarum acta gesta erant, certa ei rei forma daretur, sed traditum invenio, eam non esse constitutam, verum ad ordinarium Ordinum Generalium Collegium rejectam ejus rei curam, atque adeo tacite substitum esse in illo Decreto 27 Jan. 1651, nihil enim quicquam postea definitum est.

“Nondum igitur extricata res erat. Zelandi, ut extricarent, 22 Jan. 1651, in iisdem extraordinariis Comitiis alia rem adgressi sunt via. Existimarunt illi, non obstante eo § 4, omnes Ecclesiasticos, qui Pontificia Sacra sequuntur, expelli, nec ullos alios admitti posse, quod nempe illi Ecclesiastici, utut ex Imperio Hispanico advenientes, non essent Regis Hispaniarum subditi, sed Papæ Romani. Addebant, id ipsum Regis Legatos eo tempore, quo pax illa pangebatur, fuisse testatos, quin etiam Ordines in deliberationibus, quæ pacem præcesserunt, decrevisse, nihilominus Edicta, contra Ecclesiasticos Pontificios facta, effectum esse habitura. Quas rationes Synodorum Legati per libellum, iisdem Comitiis porrectum, deinde suas fecerunt. At prima ratio apud me parum valet, Ecclesiastici utique etiam sunt subditi, et pro subditis habentur in omnibus Imperiis Pontificiis. Si tamen, qua sunt Ecclesiastici, subditos Regis esse neges propter jurisdictionem Ecclesiasticam, non negabis certe, qui ex Imperio Hispanico ad nos advenere, Regis Hispaniarum esse incolas, *inwoonderen*, pax autem loquitur de subditis et incolis, *ondersaten en inwoonderen*. Legatos Regis aliud fuisse testatos, et Ordines in præviis deliberationibus modo decrevisse, etiam post pacem factam tuenda esse sæviora illa Edicta, non comperi, etsi diligenter quæsiverim, neque adeo de duabus illis rationibus, quæ facti sunt, quicquam habeo, quod

dicam, nec etiam de his quicquam dixerunt Gelri, Hollandi, Frisii et Groningani, nec postea etiam Transisulani, quamvis in Pontificios adhuc magis acerbi. Et tamen illæ rationes, in causa adeo recenti, omnes illos latere non potuerunt. Hoc unum comperi, Ordines, priusquam Legatos suos ad pacem pangendam mitterent, simpliciter decrevisse, se tuituros puriora Sacra, publice recepta, sed aliud est Sacra illa tueri, aliud duriora illa Edicta exsequi. Neque etiam animadverto, quid prodesset, si Legati Regis ante pacem pactam vel tale quid garrivissent, vel ipsi Ordines decrevissent. Quid in ipsa pace convenerit, unice quærendum, et ex ejus legibus, si quid inter Principes incidat, definiendum est.

*“Fuit, cum putarem, *d.* § 4, duntaxat esse intelligendum de ejusmodi subditis et incolis, qui commercia exercerent, ajunt [*493] enim verba finalia, quæ exhibui, *en daar doen hare trafique en commercie*. Sed bona fides illam interpretationem respuit, nam, quod de mercatura additur, non aliam causam habet, quam quod eo plerumque fine alterius subditi alterius Principis Imperium frequentent, non quod interdicator alterius subditis in alterius Imperium advenire, et ibi forte otuari, philosophari, et procul negotiis securum agere ævum. Hac igitur sententia nunc non utor, maxime quum alia, et, ni fallor, verior succurrat. Nempe Clericatus Pontificius, postquam emendatior Religio publice recepta fuit, in hisce Regionibus criminis speciem quandam habebat, neque enim cuiquam hic impune Clerico esse licebat, quibusdam Clericis posita mulcta, et omnibus, ut dixi, advenis Belgio Fœderato interdicto, quin et indigenis sub certo modo. Sic leges moresque ferebant, etiam ante pacem Monasteriensem; criminosis autem, ex mente *d.* § 4, quamvis in alterius Imperio habitarent, in alterius Imperium, ubi criminosi sunt, advenire nequaquam licet. Factus est *d.* § 4, belli finiendi ergo inter Regem et Ordines, ut sic, quemadmodum ibi palam expressum est, inter utriusque subditos cesset, quicquid antea hostile fuit, sed non ut cessaret persecutio criminum, quæ, etiam extra causam belli, leges publicæ vindicabant. Quare *d.* § 4, prodesse nequit Ecclesiasticis, quanquam Hispaniarum Regis subditis, quia et ante illam pacem proscribebantur, et proscribebantur non tanquam Regis Hispaniarum subditi, sed tanquam Ecclesiastici, omnium enim Principum Ecclesiasticos Pontificios, etiam eorum, quibuscum pax erat, eadem lex arcebat. Unde manifestum est, antequam Ecclesiastici, ut Regis Hispaniarum subditi, etiam hic admitterentur, nova opus fuisse pactione, ex qua, quos citra belli causam lex repellebat, hic adesse liceret, cujusmodi pactio nunquam intercessit. An tu putas, qui non propter bellum, sed propter crimen aliquod, ex Belgio Fœderato relegati deportative in Ditionem Regis Hispaniarum concesserant, et ibi, qua subditi vel incolæ, aliquamdiu egerant, an, inquam, tu putas, iis, si animum revertendi haberent, per *d.* § 4, in Belgio Fœderato esse licere? ego non puto. Exemplo res fiet clarior. Omnes Judæos impia pietate, et in manifestam Imperii sui perniciem Hispani proscripserunt, et in aliis etiam Imperiis inclementius habentur, sed aliter Hollandi, mercator Populus, sentiunt, apud hos enim Judæi, Gens ad Rempublicam commerciis frequentandam utilissima, adeo benigne recepti sunt, ut utantur iisdem Legibus et Privilegiis, quibus utuntur ceteri Hollandiæ subditi et incolæ. Quæro igitur, an Judæus ex Hollandia,

Judæorum nutricula, post *d.* § 4, in Hispaniam commeare, ibique libere morari possit? Si me audias, non poterit, nam, qua Judæus, diu ante *d.* § 4, proscriptus est, nec proscriptis favet ille § 4.

“Quamvis autem illa, quam dedi, interpretatio *d.* § 4, videatur [*494] *verissima, dubito tamen, an Ordines Hollandiæ ea uti possint. Quum enim Judæos quosdam Hollandos male accepissent Hispani, et Judæi ea de re essent questi apud Ordines Hollandiæ, hi 12 Jul. 1657, decreverunt, Judæos illos, male acceptos, habendos esse pro subditis et incolis Fœderati Belgii, ideoque et gaudere oportere eodem jure et privilegiis, quæ ex pace, cum Hispanis pacta, aut ex Pacto marino, vel ex quibusque aliis Conventionibus, cum aliis Regibus, Rebuspublicis, Principibus, Ordinibus, Urbibusve factis, hujus Reipublicæ subditis et incolis competunt, addito insuper mandato, sui in Ordinum Generalium Collegium Delegati et in hac, et in aliis omnibus causis curarent, Judæi secundum id Decretum omnino defenderentur. Si credas, illud Decretum duntaxat pertinere ad bona, non etiam ad personas Judæorum, falleris, nam quod ad bona nullus ab Hispanis metus: ecce enim septennio ante id Decretum, anno nempe 1650. Hispaniarum Regis Legatus apud Ordines Generales jam erat testatus, Judæis, qui in Belgio Fœderato essent, in Hispania liceret res suas agere per homines suos, et eorum bona non aliter haberentur, quam reliquorum subditorum Fœderati Belgii, modo ne ipsi in Hispaniam venirent.

“Igitur amplius deliberandum est de justitia ejus Decreti 12 Jul. 1657, sed, dum deliberamus, tenendum est, reliquos Ordines Fœderati Belgii nunquam simile quid decrevisse, per eos igitur recte subsistere illam interpretationem *d.* § 4, et, hac admissa, satis intelligimus, duriora illa Edicta contra immoderatum Ecclesiasticorum Pontificiorum multitudinem, in has Regiones irruentem, repeti potuisse illo 14 Apr. 1649, et postea etiam optimo jure sæpius fuisse repetita. Novissimum Ordinum Hollandiæ Edictum ea de re promulgatum est 21 Sept. 1730. Sed hoc et alia ejusdem argumenti prætereo, contentus probasse, nulla ratione *d.* § 4, plerssque Ordines Fœderati Belgii habuisse sollicitos, atque si nempe obstaret interdictioni Clericorum, huc advenientium ex Imperio Hispanico.”

No. 2.

Letter of Sir Leoline Jenkins to the Lords of the Privy Council (y)

“To the Right Honourable the Lords of His Majesty’s Most Honourable Privy Council, appointed a Committee for his Majesty’s Plantations.

“December 1, 1668.

“MY LORDS,

“The affair of St. Christopher’s, (whereof I am in obedience to your Lordships now to give an account) seems to resolve itself into these following inquiries:—

[*495] **“First, whether the French instruments of Cession, and the Most Christian King’s despatches and orders for the restoring of His Majesty’s part of that island, be valid and sufficient?*

(y) *Life of Jenkins, vol. ii. p. 735.*

"I cannot say, my Lords, but that the instrument of Cession is full enough, and agreeable to the best legal forms now current in France and Italy. Of the despatches there is this account to be given.

"In the first, dated August 28, 1667, the order for Restitution was full and clear, without any proviso or condition, yet it obtained not the effect expected. The pretence was that the Commander-in-Chief *M. de la Barre*, was out of the way when my Lord Willoughby made his demand: but it seems that was not all; for when Colonel Lambert made the same demand about two months after, at Midsummer last, *M. de la Barre* made the very same difficulties and demands that the French Ambassador now makes in his last Memorial.

"In the second despatch, dated the 17th of July last, the Most Christian King does (upon His Majesty's Letter) bewail the disappointment to my Lord Willoughby in very passionate language, both as it reflected upon the honour of a Prince, tender of nothing so much as of his word; and as it appeared to be a dissatisfaction to our most gracious Sovereign; and (to make amends) the French Governor is commanded, whether *M. de la Barre* be in the way or not, to deliver up his part to His Majesty, all delays and pretences whatsoever laid aside, under pain of disobedience and rebellion. This despatch likewise (in all probability) obtains no effect. For *M. de Lyonne* advises my Lord St. Alban's that it was desired in the French Court, that this despatch should not be sent away hence: *M. de la Barre* having been written to, to govern himself as *M. Colbert* should direct from hence, and not according to these orders.

"The last despatch, dated the 31st of October last, varies from the tenour of both the former; for it supposes the word *habitations* to be within the intendment of the VIIIth Article; and consequently, that the French bought the English houses and lands, as well as their stocks and moveables. And then it takes for granted, that *M. Colbert* has satisfied His Majesty that the English are not to be restored to their plantations, till they do reimburse the French of their demands. So that this despatch being compared with the Ambassador's Memorial, promises no great effect.

"For the Ambassador desires: 1. That the French, who shall become subjects to this Crown, may be treated in all respects as English. 2. That they be not in the least disturbed in their possessions, till we pay them back their purchase-money. 3. That we give them content (that is the word, which cannot imply less than good security) in the demands they make for improvements. 4. That His Majesty would please to prefix a day, within *which the English shall be bound to reimburse the French; and in default of doing so, the English [*496] to be declared for ever incapable of being restored to their own: This implies, that very much is expected to be done on our part, before the French do anything on theirs; as if the VIIIth Article were a necessary condition, antecedent to the performance of the VIIth, which is not only distant from the sense of the article, but contrary to the tenour of this and all other Treaties. And though the King's letter mentions no more but the reimbursement of the purchase-money, yet it is with a *bien*

entendre, that this must be done effectually, before the English be restored to their possessions.

“Another inquiry is, whether the word *Bona* comprehends lands and houses, as well as stock, and those moveables which we call a personal estate?

“It cannot be denied, my Lords, but that the word *Bona*, in the Roman Civil Law, as also in the present laws and customs of the French, comprehends both the one and the other in many cases; though in this case it does not, as may be evinced by several arguments.

“First, In this Treaty with the Dutch and the Dane at *Breda*, the clauses and proviso's concerning lands and immoveables on the one side, and concerning goods and moveables on the other, are still distinct and separate, as things opposite in their notion. For instance, in the Treaty with the Dutch, the right of all lands, towns, forts, places, and colonies, is, in the IIIrd and VIth Articles, settled one way; and in the IVth and VIIth, that of *Bona cuncta mobilia*, another way: Just so it is with Denmark in the Vth; their moveables, *Quicquid Bonorum*, fall under one provision, and in the VIth, their territories under another: 'Tis so in the elaborate Treaty of the Pyrenees, 1659. For moveables, *des Debts, Merchantdizes, Effects* and *Meubles*, it has distinct Articles, the XXIIInd and XXIXth, but nothing moveable mingles in those other Articles that do settle lands, territories, and real estates. So it is in the Treaty of Chasteau Cambresis, and several others. The Territory therefore and Sovereignty of St. Christopher's, being the subject-matter of the VIIth Article of the Treaty with France, the word *Bona*, in the following Article, (in this Treaty as well as in the others) must mean moveables, and nothing else; for the *Forma Communis* must needs in construction of law be here intended and observed, since the variation from it is not expressed. And it cannot be well imagined, that the word *Bona* should signify one thing to the Dutch and Dane, and another thing to the French, where both the subject-matter of the debate, and the persons treated with by the three parties, were the very same. From these concurrences, the law raises *validissimam conjecturam*, and a full light wherewithal to clear the ambiguity.

“Secondly, The case of the English is extremely favourable, 'tis to be restored to their own by a sacred compact; and the word *Re-
[*497] stitution is so favourable, that when a heinous malefactor hath it in his pardon from his Prince, it does not only take off his punishment, but also restore him to his good name, honours, and estate: much more then shall those that are restored *ex debito justitiæ*, recover everything that the Treaty does not in very clear and express terms deny them.

“Thirdly, The civilians and feudists do hold, that lands held by such tenures and services as the English held theirs in this island, are not comprehended under the word *Bona*; and in this very case, when they say, (and 'tis a very common saying) *Bona in bello capta cedunt occupanti*, they must mean moveables only; the lands and houses going another way, that is, to the conqueror.

“Fourthly, By the VIth Article of War, upon the surrender to the French, the English had power to dispose of their immoveables, and to

carry away their moveables, excepting negroes and cattle, 'tis clear they could dispose of no more than what the Treaty gave them leave to do, all the rest being devolved to the French *Jure Belli*; therefore, since they had not power granted them to dispose of their *Fonds, Maisons*, and heritages, their houses and lands did not pass. The word *Immeubles*, when opposed to *Meubles* in the French laws, signifies no more than what we call chattells real, parcels of the freehold, and choses in action, here in England.

"But if it be urged, that the English have made over, not only their moveables, but their lands and houses, to the French by firm conveyances, it is humbly conceived, that whatever those contracts were, they are not to be measured and expounded by the Treaty. Besides, these conveyances were some of them void, as being forced by threats and terrors; some of them voidable, as being under half the real value, and some of them utterly feigned and false. An instance whereof is given in Captain Freeman, who was before your Lordships the other day. He passed away his estate to M. de Chambers, Director of the West-India Company, for 40,000 sugars, that is, about 400*l.* sterling: his estate was worth 1000*l.* a year, and 'tis set down in the contract, that he has received all these sugars; yet he utterly denies the receiving of one penny value. Nay, that he was forced to pay 20,000 sugars for a boat to this purchaser, to carry himself and his family.

"A third question is, whether the French are bound to repair His Majesty's three forts, that they have demolished, since the publishing of the peace?

"There is no express provision, my Lords, in the VIIth Article, about rendering the forts to His Majesty. But in case the French (with whom the English are to be taken *pari passu*) had been beaten out of the island, the rule given to the English was, *Nihilominus in eum Statum restituantur Galli, in quo initio anni 1665 erant*. And the Dutch stipulating to surrender forts among other things, in case they should take them after the 10th of May, *do promise that *bona fide in eodem planè statu confestim restituentur quo tum temporis* [*498] *reperientur, quandocunque de instauratâ Pace in iisdem Locis constabit*. And when forts are to be rendered, they must not be demolished places; for in interpreting of Treaties, the rule is *verba artis* (as a fort is) *secundum artem intelligenda sunt*.

"A fourth inquiry is, concerning the improvements and the costs, which the French are said to be at upon the plantations.

"What the Ambassador's Memorial hath, of all laws and all nations allowing for necessary expenses and improvements, is under favour to be understood, when the possessor is in *bona fide*; but if he be *malæ fidei possessor*, an usurper solemnly denounced against, yet continuing his usurpation by force of arms, he shall be so far from recovering his layings out, that he shall account for the profits he hath received to a farthing; but putting the case, that the French had been all this while in *bona fide*, as they were, till my Lord Willoughby summoned them; yet when their demands are not liquid, the law allows them not to detain the thing improved; they must accept of security, to be reimbursed of

what shall appear to be justly due. This was offered the French by Colonel Lambert, when he made his demand in June last, but it was not accepted.

“ Besides, in purchases that are subject to Restitution, by that which the French call *Retraict Lignager*, the buyer is expressly forbidden in France to lay out any more, or other charges in building or repairing, than are purely and absolutely necessary, within the year and the day allowed to the next of kin to come in. The reason is, that the purchaser may not, by expenses unnecessarily laid out, render the recovery of the thing more difficult to the family. The restitution of the English in this case is no less favourable : Therefore, whatever the French have laid out since the knowledge of the Treaty, upon pretence of improvements, they have laid out in their own wrong, and by the equity of law are precluded, and have no colour to demand any account, satisfaction, or reimbursement from the English.

“ The extravagant demand, my Lords, of almost 7,000*l.* sterling, for food and necessaries to the English prisoners, and of 800*l.* for chirurgeons about them, needs not, as I conceive, any answer, till it be known what reparations the English are like to have for the waste, the spoils, the demolition, acted upon their plantations since the peace.

“ So that, my Lords, upon the whole matter, the true and honest meaning of the Treaty being, that the most Christian King, on his part, do forthwith order his subjects to quit all the plantations they are possessed of, and to leave the English part entirely to the English ; and that His Majesty, on the other side, do not suffer the English to lay claim to their own cattle, slaves, or other goods, unless they do first lay [*499] down the money or value, for which *they formerly sold them ; but that the French be at liberty to carry them away, or otherwise dispose of them as their own : If the French have made any improvements before notice of the peace, they ought to be reimbursed ; if they have done us any damages since, they ought to repair them. This I hope will be done, and nothing less than this can be done, if the French do, as the Most Christian King in his two first despatches directs, proceed *sincèrement et en bonne foy*. But as to the particular demands of disbursements for meliorations, and for prisoners on their side, and the demands of reparation for waste, spoil, and utter demolition, on our side, they must, as I humbly conceive, be left to Commissioners to be adjusted upon the place. All which I do most humbly submit to your Lordship’s high wisdom.”

No. 3.

HOTHAM AND TWO OTHERS V. THE EAST INDIA COMPANY.(z)

“ THE ship *York*, of which two of the plaintiffs were part-owners, and the third captain, had been freighted by a charter-party between

(z) Douglas’s Reports, pp. 272–78.

them and the East India Company, on a voyage from London to India and back to London. On her return home she met with a most uncommonly violent storm off Margate, where she was stranded, on the first of January, 1779, and sunk under water. By this misfortune, a great part of her cargo (being salt-petre) was lost; the principal part of what remained, which consisted chiefly of pepper, was greatly damaged by the sea-water, but was got out of the ship by persons sent down by the Company, and brought to town in other vessels, where a particular process was employed, at a great expense to the Company, to restore it, in some degree, and render it marketable. The ship, after being in a great measure unloaded, was with much difficulty raised out of the water, and arrived in the port of London, with a small part of the cargo still remaining on board. The plaintiffs insisted, that she had arrived at her port of discharge, and had performed her voyage within the meaning of the charter-party, and that, notwithstanding the misfortune which had happened, and the loss of part, and the damage done to the rest of the cargo, they were entitled to be paid the freight of the goods saved, and the demurrage. The defendants contended; First, that in the events which had happened, they were discharged from the payment of any freight, or demurrage; Secondly, that if they were liable for freight and demurrage, yet, by certain *clauses in the charter-party, they were entitled to deduct therefrom the value of the goods lost; [*500] the loss upon those which were saved in a damaged state; and the expenses they had been put to in getting those damaged goods to London and rendering them marketable. A common action of covenant was at first brought on the charter-party, to which the defendants pleaded; but afterwards both parties consented to try the questions in dispute between them in four different feigned issues, which were as follows:—

“1. Whether the plaintiffs were, or were not, entitled to any and what freight or demurrage in respect of the ship and voyage in the charter-party mentioned?

“2. Whether the plaintiffs were liable to pay or allow to the defendants any sum or sums of money in respect of the goods and merchandizes which had been shipped on board the said ship, and which had been lost, or not delivered to the defendants on her arrival in England?

“3. Whether the plaintiffs were liable to pay or allow, &c. in respect of a certain quantity of pepper which had been shipped, &c. and which had been prejudiced, wet, and damnified, before the arrival of the ship at London?

“4. Whether the plaintiffs ought to pay or make satisfaction to the defendants, for the expences they were at, in saving and bringing to London certain goods and merchandizes which were taken out of the ship when she was stranded, or otherwise concerning the said goods?

“These issues came on to be tried, before Lord Mansfield, at Guildhall, at the Sittings after last Trinity Term.

“There were two clauses in the charty-party on which the defence on the first issue was founded, viz.—

“1. ‘And as touching the freight to be paid or allowed by the Company, it is agreed, and the Company covenant with the said part-owners,

that the Company shall and will, *in case and upon condition that the ship performs her voyage and arrives at London in safety*, and the said part-owners and masters do perform the covenants on their part, and *not otherwise*, well and truly pay and allow the freight herein mentioned.(a)

"2. 'It is hereby agreed, that in case the ship does not arrive *in safety* in the river Thames, and there make a right delivery of the *whole and entire* cargo and landing on board the said ship as aforesaid, the Company shall not be liable to pay *any of the sums of money herein before agreed to be paid for freight and demurrage*, nor subject to any demands of the said part-owners or master on account of the said ship's [501] earnings in freight, voyages for the *Company, or on account of any other employment, any other law, usage, practice, or custom, notwithstanding.'(b)

"The following clause was the foundation of the defence on the second issue :—

"'And, if any of the homeward-bound cargo shall be *lost or undelivered into the said Company's warehouses* at the said ship's arrival in England (except that no such payment shall be made if there happens an utter inevitable loss of ship and cargo, nor shall any other payment be made for such goods as shall necessarily perish or be cast into the sea for the preservation of the ship and cargo, than by an average to be borne by ship, freight, demurrage, and cargo,) the part-owners and master shall pay or allow to the Company the prime cost of such goods, and 30% for every 100% on such prime cost.'(c)

"On the *third* issue they relied on the following clauses :—

"1. 'But, if any of the homeward-bound cargo, when delivered into the Company's warehouses in England, shall be found to be prejudiced, wet, or damaged, by any occasion or accident whatsoever, it shall be lawful for the Company to refuse such goods, and in such case the part-owners and master shall take them, and allow to the Company the sums which they are invoiced at, with charges, customs, and duties, and in such case the Company shall pay no charges or freight for the said goods so prejudiced, wet, or damaged, unless in cases of damaged pepper, which the part-owners and masters are to allow the Company for at the current price of sound pepper in London, and the Company are to pay the freight and charges on such pepper as if it were not damaged.'(d)

"2. 'But the said part-owners shall not be charged with any sum of money in respect of goods damaged on board the said ship, but such as shall, by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship-damage; any thing herein contained to the contrary thereof in anywise notwithstanding.'(e)

"3. 'A provision for paying demurrage to the owners, if the ship should be dispatched safe from the Malabar coast, and should not make the passage in a limited time: and which adds, 'and the owners shall not

(a) P. 8, of the East India Company's charter-parties.

(b) P. 11, of the East India Company's charter-parties.

(c) Ibid. pp. 4, 5.

(e) Ibid. p. 13.

(d) Ibid. pp. 4, 5.

be responsible for any damage that may happen to the homeward-bound cargo, occasioned by such late dispatch.'(f)

"The jury having found for the plaintiffs on the three first issues *(viz., That freight was to be paid for all the Company's [*502] goods delivered, and demurrage, as specified in the charter-party; 2. That the plaintiffs were not liable to pay for any goods lost, or not delivered; 3. That they were not liable to pay or allow for any loss on the pepper,) and for the defendants on the last (viz., That the plaintiffs were to pay the defendants their proportion of the expenses in saving the goods and merchandizes, by way of general average, as specified in the charter-party, and the whole extra expense of bringing the goods from Margate,) a rule was obtained by the defendants to show cause, why there should not be a new trial on all the issues found against them; and the case was argued this day, by Lee, Davenport, Baldwin and Erskine, for the plaintiffs, and the Soliciter-General, and Dunning for the defendants.

"The counsel for the defendants relied, as to the freight and demurrage, on the strict terms of the instrument, by which it was stipulated that neither should be paid for, unless the ship should arrive in safety in the river Thames, and there make a right delivery of the whole and entire cargo. If the plaintiffs had proceeded in covenant, such an arrival and such a delivery must have been averred, and was now necessary to have been proved to make out the case on the part of the plaintiffs. In a Court of Law, the stipulations of the deed must appear to have been exactly complied with; and, if any relaxation was to be allowed, on principles of equity, recourse must be had to a Court of equity.

"The same reasoning was equally applicable to the second issue.

"On the third, they insisted, that 'ship-damage' was synonymous to 'sea-damage,' and meant, damage happening at sea, in contradistinction to any injury the goods might have received before they were put on board, not merely damage at sea occasioned by insufficiency in the ship or the misconduct or negligence of the master or mariners, which was the interpretation contended for on the part of the plaintiffs. Without any stipulation, the owners and master would have been answerable to the Company for losses arising from those causes. The word 'ship-damage,' it is true, was meant to controul the general words in a preceding part of the instrument, by virtue of which the plaintiffs would otherwise have been liable if the goods had been prejudiced or damaged by any occasion or accident of *any sort*; but, according to the construction contended for by the plaintiffs, this prior clause would be totally annulled by the other. The saving in case of a late departure from the Malabar coast, affords an additional proof that sea-hazards from weather, storm, &c. were meant. For how could a detention beyond the usual season increase the danger of damage from insufficiency in the vessel (independent of what the weather might occasion,) or from misconduct in the master or the crew?

*"On the other side, it was insisted, that this sort of instrument ought to receive a liberal construction. The non-compliance [*503] with the letter of it, in not delivering the cargo in the river Thames,

was owing to the act of the defendants themselves, in sending their servants on board, who took it out of the ship without any participation with the plaintiffs. This discharged them from the necessity of performing strictly that part of the contract (as to which the case of the *Sparrow v. Caruthers*, reported in *Strange*,^(g) was in point,) and the discharge might have been averred in an action of covenant. That, as to the goods damaged or lost, the charter-party was certainly very confused and ill digested, full of contradictions, owing to the circumstance of different clauses having been added at different times, without attention to the coherence and consistency of the whole. But it must be interpreted in a manner the most consistent with good sense, and the nature and the general tendency of the whole contract. The expression of '*ship-damage*' could not be used in opposition to damage received before the goods are put on board, because the owners could never be answerable for that sort of injury, and therefore it never could have been thought necessary to introduce words to declare that they were not.^(h) It must mean damage received on board of the ship, and occasioned by negligence or misconduct; surely not damage arising, as in the present case, from the act of God, which no human care could prevent. If there were any doubt, the special jury who had exercised their judgment upon it were certainly most competent to determine it, no question being more exclusively fit for their consideration. The owners therefore were by that clause exempted from responsibility for any other sort of damage but ship-damage so understood, and the foregoing words '*by any accident whatsoever*' were thereby controuled and restrained. Then, as to the goods lost, this being the clear meaning of ship-damage, and universally so understood by persons conversant with the subject, it could never be the intention of the contract, that, though the owners were not to be answerable for goods *damaged*, they were for goods *lost*, by the act of God. The strict compliance with the words on which the defendants relied as to the goods lost, was never expected. The cargoes of Indiamen are never delivered [*504] into the Company's warehouses, but only *into lighters belonging to the Company. *Edwin v. The East India Company*,⁽ⁱ⁾ and *Edwards v. Childs*,^(k) were cited.

"Lord Mansfield,—I have no doubt but that, if the delivery at Margate was, in the contemplation of the parties, substituted for a delivery at London, it might have been averred in an action of covenant,^(l) because there can be no material fact in a cause which may not be put upon record, or given in evidence on the general issue. The Company are not liable to any imputation. The part they took, when the calamity happened, was what humanity and justice required, and can be of no prejudice to either side. The charter-party is an old instrument, informal,

(g) "T. 18, Geo. 2 Str. 1236."

(h) "It was said that the clause mentioning ship-damage was first introduced in 1759, when the *Ilchester* East-Indiaman was lost. The then Solicitor-General had given an opinion, that the charter-party, as it then stood, would make the owners liable for losses by storms, and with the express design of preventing that construction, this new clause was adopted."

(i) "Canc. H. 1690, 2 Vern. 210."

(k) "Banc. M. 1716, 2 Vern. 727."

(l) "Vide *Jones v. Barkley*, infra, T. 21, Geo. 3, p. 684."

and, by the introduction of different clauses, at different times, inaccurate, and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know no difference between a Court of Law and a Court of Equity.^(m) A court of equity cannot *make* an agreement for the parties; it can only explain what their true meaning was; and that is also the duty of a Court of Law. I told the jury, that the instrument must have a liberal construction, according to the true intention, and I left the construction to them more than in common cases ought to be done, because the province of construing written instruments belongs to the Court. On the point of *ship-damage* I had considerable doubts, which I stated fully to the jury. The Company have thought fit to bring the case before the Court, but, upon hearing the argument, I am now clear that the verdict was right in all the issues. As to the first, the Company, by receiving part of the cargo, have waived all objections concerning the delivery.⁽ⁿ⁾ The principal question is, whether the owners are to pay for the damage occasioned by the storm—the act of God; and this must be determined by the intention of the parties, and the nature of the contract. It is a charter of freight. The owners let their ships to hire, and there never was an idea that they insure the cargo against the perils of the sea. The Company stand their own insurers. Words must be construed according to the subject-matter. What *are the obligations upon the owners [*505] which arise out of the fair construction of the charter-party? Why, that they shall be answerable for damage incurred by their own fault, or that of their servants, as from defects in the ship, or improper stowage; such as mixing commodities together which hurt one another, &c. If they were liable for damages occasioned by storms, they would become insurers, not freighters.^(o) Many of the difficulties which have been raised, are occasioned by the multiplicity of unnecessary words, introduced with a view to be more explicit; an effect which often arises from the same cause in acts of parliament. It seems the question had occurred in the year 1759, and the clause mentioning *ship-damage* was introduced in order to fix the risks for which the owners were to be answerable. That clause rides over all the former part of the charter-party. As to the other point of *the goods lost*, the whole is one entire contract, and must be understood in a manner consistent with itself; and it never could be intended that the owners should be protected from the lesser loss, and remain answerable for the greater.'

^(m) "In the case of *Edwin v. The East India Company*, Vernon makes the Court say, 'Though the charter-party is so penned, that nothing can be recovered at law, yet the plaintiffs have a just demand, and ought to be relieved in equity.'"

⁽ⁿ⁾ "His Lordship had interrupted the defendant's counsel to ask, whether the Company could mean seriously to insist that they were to have the use of the ship and the goods which had been delivered, and not pay for the freight of them."

^(o) "There is a distinction in this respect between *goods* and *ship*: 'for it is in common experience that the owners of ships are in some sort their own insurers,' per Lawrence, J. in *Beatson v. Schank*, 3 East, 233; where it was provided by the charter-party that in case of the 'inability of the ship to execute or proceed on the service,' an abatement should be made on the freight; and it was held that inability by reason of disease among the crew, and desertion from apprehension of it, was inability within the terms of the proviso."

“Willes, Justice, absent.

“Ashurst, Justice,—‘I am of the same opinion. The consideration, that the owners are not insurers, controuls every branch of the instrument. If the proviso concerning ship-damage had been wanting, there might have been some doubt; as the case stands there is none.’

“Buller, Justice,—‘I am of the same opinion. There could have been no doubt on the subject of the first issue, if the parties had gone on in the usual way, by an action of covenant on the charter-party. If an act undertaken to be done is dispensed with by the other party, it is sufficient so to state it on the record; special pleading being nothing but a bare narration of facts in a legal form.’

“The rule discharged.”

[*506]

*No. 4.

In the Exchequer Chamber.

MARRYAT v. WILSON IN ERROR.(p)

“A WRIT of error having been brought in this Court on the judgment given in the Court of King’s Bench between these parties, (vid. 8 T. R. 31,) the case was argued early in this term by *Rous* for the plaintiff in error, and *Gibbs* for the defendant; the general line of argument, however, being the same as that in the King’s Bench, and much commented on in the judgment of the Court, it was thought unnecessary to do more than subjoin in the form of notes to the following judgment whatever appeared at all new or material.

“The Court took time to consider of their opinion which was this day delivered by,

“EYRE Ch. J.—‘The substance of this record having been very recently stated to the Court, and the record at large being to be found in the Term Reports, I shall content myself with referring to it, stating so much of it only as may be necessary to introduce the questions which have arisen upon it. This is an action upon policies of insurance set forth in the first, third, and fifth counts of the declaration. That in the first count being a valued policy on one moiety of the ship *Argonaut*, Collett master, at and from Bourdeaux to Madeira, and the East Indies, and back to America, with liberty to touch, stay, and trade at all ports and places whatsoever or wheresoever on the outward or homeward-bound voyage; and this policy is stated and found to have been effected by the plaintiff for the use of John Collet. The policy in the third count being a valued policy on goods, neutral property on board the same ship, on a voyage at and from Bourdeaux to the East Indies, with liberty to touch, call, and trade at all ports and places or islands whatsoever and wheresoever as well at the Cape as on this or the other side of the Cape of Good Hope, until her arrival at her port of discharge in Bengal; and this policy is also stated and found to have been effected for the use of the said John Collet. The policy in the fifth count being on goods warranted

American property laden on board the same ship for a voyage at and from Madeira to her last port of discharge in India, with liberty to touch, stay and trade at all ports, places, and islands whatsoever and wheresoever, as well at, as on this and on the other side of the Cape of Good Hope; and this policy is stated *and found to have been effected for [*507] the use of the said John Collet and one Anthony Butler.

“ ‘The defendant underwrote all these policies, and a loss has been sustained both of ship and cargo which is admitted to be within the terms of the policy; but it has been insisted on the part of the defendant that the voyages described in these policies are illegal voyages, and as such cannot be made the subject of contracts of this nature, and therefore that the defendant is not bound by these contracts to make good his proportion of the loss.

“ ‘The facts of the case upon which this charge of illegality is founded, as may be collected from the special verdict in this case, are these: John Collet and Anthony Butler, on whose account these policies were respectively effected, appear to have been natural-born subjects of His Majesty but to have been resident and domiciled within the United States of America, the latter before the declaration of the independence of the United States, the former at a period subsequent to the ratification of such independence. On the 12th of June, 1795, they became the owners of this vessel in moities; on the 25th of July, 1795, Collet sailed in her as master, having a cargo of corn and flour on board, from Philadelphia for France, with a view of proceeding from thence with the ship, after the disposal of her cargo there, to Madeira and the East Indies, and from thence back to the United States. On the 1st of May, 1796, Collet arrived with this ship at Brest, and there sold his flour; he afterwards proceeded to Bourdeaux, where he sold the remainder of his cargo, and he there shipped on his own account the goods mentioned in the second of these policies. While the ship remained at Bourdeaux, Collet came to London, and having procured a credit with the plaintiff in this cause, he, the plaintiff, purchased here upon his own credit by commission goods and merchandise of British growth and of British manufacture on account of Collet and Butler, and these are the goods which are the subject of the third of these policies.

“ ‘The plaintiff by the direction of Collet, and during his stay in London, shipped these goods in the port of London, on the joint account and risk of Collet and Butler on board three American ships, in which they were carried from London to Madeira for the purpose of being there re-shipped and put on board the Argonaut, and of being carried in that ship, together with the goods shipped on board her at Bourdeaux from Madeira, to the British territories in the East Indies, and of being imported into those territories, and traded, trafficked, and adventured in there; and it appears that at the time of this loss, Collet and Butler remained debtors to the plaintiff for the amount of these goods. On the first of May, 1796, the Argonaut sailed from Bourdeaux with the goods there taken on board her for Madeira, in order *there to meet, receive, and take [*508] on board the goods shipped from London: she arrived at Madeira and took those goods on board there, and afterwards sailed from Madeira

in the prosecution of her voyage to the East Indies, in the course of which voyage she was seized by the commander of a squadron of the King's ships on suspicion of being an illicit trader, and this has been considered throughout the cause on all sides as a total loss of the ship and cargo.

“ ‘It seems to have been admitted on all sides in this cause, that this voyage and the trade and traffic intended to have been carried on by the Argonaut with the British territories in the East Indies, is to be considered as illegal and the ship an illicit trader, unless the voyage and the intended trading were legalised by the Treaty of Commerce which was entered into between Great Britain and the United States of America on the 19th of November, 1794, which was afterwards ratified by the United States on the 14th of August, 1795, and by His Majesty on the 28th of October in that year, and retrospectively confirmed by Parliament in the 37 Geo. III.

“ ‘By the 11th article of that Treaty it is agreed that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between their respective people in the manner, under the limitations and on the conditions specified in the Treaty.

“ ‘By the 13th article His Majesty consents that the vessels belonging to the citizens of the United States of America shall be admitted and hospitably received in all the sea-ports and harbours of the British territories in the East Indies, and that the citizens of the said United States *may freely carry on a trade between the said territories and the said United States*, in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited: provided only that it shall not be lawful for them in any time of war between the British Government and any other power or State whatever, to export from the said territories, without the special permission of the British Government there, any military stores, or naval stores, or rice. The citizens of the United States are to pay no higher tonnage duty than British vessels pay in the ports of the United States, and they are to pay the same import and export duties as are paid by British vessels. It is expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the said British territories to any port or place, except to some port or place in America, where the same shall be unladen, and such regulations shall be adopted by both parties as shall be found necessary to enforce the due and faithful observance of this stipulation. This article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the British territories: and for explanation it is added, that vessels going with their original cargoes or part *thereof, from one port of discharge to
[*509] another, are not to be considered as carrying on the coasting trade. This article contains some other provisions by which Americans are to govern themselves in their intercourse with the British territories, but nothing arises upon that part of the article material to the present subject.

“ ‘On the part of Mr. Marryat, the defendant in the action, it has been insisted by Mr. Rous, who entered very fairly into the real merits of the case, that according to the true construction of this Treaty,

viewing it in all its parts, and attending both to the letter and the spirit of it, the trade to be carried on between the British territories in the East Indies and the United States, is a direct and immediate trade from the United States to the British territories, as well as from the British territories to the United States, which unquestionably must be direct and immediate, it being expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the British territories in the East Indies, to any port or place, except to some port or place in America, where the same shall be unladen; and consequently that the voyages insured from Bourdeaux and from Maderia not being protected by the moiety were *ex concessis* illegal.

“ ‘ Mr. Rous’s verbal criticism upon the word *between* was ingenious, and well supported : but in truth there is hardly a word in the English language less precise in its meaning or more indefinite in its application than the word “between.” According to the context it is used to express the strictest local sense of *to* and *from*, or the most remote relation which any one thing can have or bear to another. For instance, when we say that the inlet from the Western Ocean to the Mediterranean is between the coast of Spain and the coast of the empire of Morocco, it marks geographical lines precisely drawn. But if we were to say that the intercourse between the coast of Spain and that of the empire of Morocco was interrupted by the religious opinions and the habits of living prevailing in the two countries, the word “between” would have no other effect than to point out the countries or nations whose intercourse is spoken of as interrupted by the causes enumerated, and would mean no more than what is meant by the same word in 11th article of this Treaty, where the expression is “*between* their respective people.” When we leave this narrow ground of argument, and proceed to consider the whole context of this article, the generality of the expressions, the most obvious interpretation of those expressions, and all the probable and possible consequences which may follow from our exposition of this article, the subject expands itself to an alarming magnitude, and the argument would take a very wide compass indeed, if it were now to be entered into for the first time : but after the very elaborate discussion which this *cause has undergone in the Court of King’s Bench, [*510] where a solemn judgment was pronounced at the close of a fourth argument, and considering that the judgment has now been submitted to our review upon arguments which, though very ably put, have not materially varied the state of the questions which have been made and decided upon by that Court, we do not feel ourselves called upon to enter very much at large into the subject, and I shall content myself with stating as shortly as I can the grounds upon which the unanimous opinion of this Court, that the judgment of the Court of King’s Bench is not erroneous and ought to be affirmed, may be supported.

“ ‘ The language of the 13th Article is that the citizens of the United States may freely carry on a trade between the said territories and the said United States, in articles not entirely prohibited. They are therefore not restricted to trade in articles of the growth, produce, and manufacture of the United States : it is enough that the articles they trade

in are not articles prohibited from being imported to the British territories in India, or exported from thence by any body. If then they propose to trade with the British territories in India in foreign commodities as they may do, they must use means to furnish themselves with those commodities. In the nature of things it must be done in a course of trade. The obvious course of trade is that they should carry their native commodities to other countries where they can be exchanged with the most advantage for articles proper for the East India market, and that they should then proceed to India in order to carry on a trade there in those articles. I find nothing in the treaty which will warrant me in saying that it was the intention of the contracting parties that the trade conceded by the Treaty should not be so carried on. Mr. Rous found himself obliged to acknowledge that the citizens of the United States might within the terms of this treaty first import into America the articles in which they propose to trade with the British territories in India, and then export them from America in a direct voyage to the East Indies, and he could not deny that they might have imported these articles into America even from London. Indeed it would have been a most extraordinary state of things if they might have gone to every other market for the goods they wanted, but that the British market was excluded. As to the apparent disadvantage under which the citizens of the United States would carry on trade with the British territories in India so conducted, Mr. Rous argued, that so to understand the Treaty would be only to give the fair and due preference to the great national commerce of the East India Company. Whether this trade should have been conceded under any qualifications or restrictions is one thing, it having been conceded, now, to attempt to cramp it by a narrow, rigorous, forced construction of the words of the treaty is another and a very [511] different *consideration. We cannot suppose that an indirect advantage was intended to be reserved to the East India Company by so framing the Treaty that the American trade might by construction be put under disadvantage; because this would be a chicanery unworthy of the British Government and contrary to the character of its negotiations, which have been at all times distinguished for their good faith to a degree of candour which has been supposed sometimes to have exposed it to the hazard of being made the dupe of more refined politicians. The nature of the trade granted in my opinion fixes the construction of the grant. If it were necessary to go farther, strong arguments may be drawn from the context of this article and the contrast, which the comparing it with the preceding article will produce. From the context it appears that the trade was to be *free*, subject only to certain specific regulations. The citizens of the United States are put upon the same footing as to duties with British subjects. No question is proposed, no means of ascertaining the fact are provided, where they come *from*, though it is anxiously stipulated where they are to go *to*.

The words "*original cargo*" are to be found in the article, and it was supposed they might be used as a ground to infer that the trade was to be direct from the United States. But "*original cargo*" is plainly set in opposition to the cargo to be taken in in India. The provision

respecting it is that though the coasting trade is not permitted to the citizens of the United States, they may carry the cargo, which they originally brought with them, into the ports of the British territories from one port of delivery to another, for the purpose of a market. The word *original* serves the purpose for which it is used perfectly well, and it marks a total indifference to the question where the cargo was picked up. I have already had occasion to take notice that as to the cargo to be imported, no other restriction or qualification was in the view of the contracting parties than that it should consist of articles not expressly prohibited. But when this article is contrasted with the preceding article, the true construction of it will be seen in a still clearer point of view. The 12th Article is in substance, that it shall be lawful for the citizens of the United States to carry to any of His Majesty's islands and ports in the West Indies *from the United States* in their own vessels, not being above seventy tons, any goods or merchandize being of the growth, manufacture, or produce of the said States, which British vessels might carry to the islands from the said States, and that the citizens of the United States may purchase, load, and carry away in their said vessels to the United States from the islands, all such articles being of the growth, manufacture, or produce of the islands, as British vessels could carry from thence to the said States, provided that the American vessels carry and land their cargoes in the United States only, it being agreed *that the United States are to prohibit and restrain* **the carrying any molasses, sugar, coffee, cocoa, or cotton in* *American vessels, either from His Majesty's islands or from the* [*512] *United States, to any part of the world except the United States*, and there is a proviso that British vessels may import from the islands into the United States, and may export from the United States to the islands, all articles of the growth, produce, or manufacture of the islands or of the United States respectively, which by the laws of the said States might be then imported or exported.

“The trade to be carried on between the citizens of the United States and the British West India islands, by virtue of this article, is required to be in goods of the growth, produce, or manufacture of the islands and United States respectively. This trade in the nature of it must be immediate and direct. It could not be in the contemplation of the contracting parties that it might be circuitous, except indeed within the limits of the United States and within the range of the British West India islands, and so far as I take it, it is circuitous. The contracting parties could not look to so remote a possible case as that a citizen of the United States might load the native commodities of the United States in a foreign port, and therefore we are not driven to collect the meaning of this article from the precision of the language it uses. Its language is however most precise. The *terminus à quo* and the *terminus ad quem* are designed with as much certainty as would be required in an indictment for not repairing a particular part of the King's highway. And to exclude all possibility of misapprehension, to mark how entirely this trade was to be immediate and direct, a provision is added that the United States are to prohibit the carrying goods of the

produce of the West India islands in American vessels to any port of the world except the United States. Thus contrasted, those articles afford an illustration of the internal evidence of the import and true intent and meaning of each considered separately, and the conclusion from the whole appears to us to be irresistible that the trade to be carried on under the 12th Article between the United States and the British West India islands, is a direct trade, and that the trade to be carried on between the United States and the British territories in the East Indies under the 13th Article, may be as circuitous as the enterprising spirit of commerce can make it. There may be reason to apprehend that such an intercourse with the British territories in the East Indies may prove very injurious to the interests of the East India Company, and to Great Britain in respect of the great national commerce which is carried on by that Company. In particular there may be reason to apprehend that this Treaty will open a door to many of our own people whom the policy of our laws has shut out from a direct trade to the East Indies. In truth it can hardly be expected that the spirit of commerce, too often found eluding laws made to keep [*513] it within bounds, that the *lucri bonus odor* should not embark British capital in this trade. This ought to have been foreseen, and therefore I conclude it was foreseen, and that it was found that the balance of advantage and disadvantage preponderated in favour of the Treaty. If not, those who advised it will have to answer for it: the responsibility is not with us. We are not even the expounders of treaties. This Treaty is brought under our consideration incidentally as an ingredient in a cause in judgment before us: we only say how it is to be understood between the parties to this record. This we are bound to do; and we have but one rule by which we are to govern ourselves. We are to construe this Treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A. and B., or happen to be two independent States. The judges who administer the municipal laws of one of those States would commit themselves upon very disadvantageous ground,—ground which they can have no opportunity of examining, if they were to suffer collateral considerations to mix in their judgment on a case circumstanced as the present case is. It has been urged that in this instance (at least as to the goods in the third policy) this was a commerce direct from this country, and that this treaty does not open a trade between Great Britain and the British territories in the East Indies to the prejudice of the monopoly vested in the East India Company. This objection is plausible but not founded. The circumstance that this part of the cargo of the Argonaut was procured here, and the share which the plaintiff Wilson had in procuring it, might have deserved consideration as evidence of a collusion, by means of which Wilson was carrying on for himself an illicit trade to the East Indies, which might have subjected this ship and cargo, or this part of the cargo, to seizure and confiscation. But this use has not been made of the facts found by the special verdict: and no other use, consistent with our opinion of the

legal effect of the Treaty, could be made of them. For a citizen of the United States being allowed to trade to the British territories in India, generally with an exception of a few articles only, as he may take in his cargo in the ports of his own country, so he may take it in in the ports of this country as well as any other; and he may employ an agent, and that agent may be a British subject. It is a lawful agency. It seems to me impossible to maintain in argument that the subject of a nation in amity who may trade to the British territories in India, should be excluded from one market for his outward investment, when all other markets are open to him, and when it is distinctly admitted that the markets of all the world, including ours, *circuitously* must be open to him.

*“ There remains one other topic of which I am called upon to take some notice. It is said that Collet, who is solely interested in [*514] the two first of these policies, and has a joint interest with Butler in the last, being a natural-born subject of this country, cannot shake off that character, and become an American so as to entitle himself to the protection of this treaty. He is a British subject trading to the East Indies: his trade is therefore illicit: the voyages insured are illegal: and the policies are void. Or, perhaps the objection ought to be put another way, thus. The vessels in which only the trade can lawfully be carried on between the United States and the British territories in India, according to the provisions of the statute 37 Geo. III. c. 97, must be owned by subjects of the United States, and whereof the master and three-fourths of the mariners, at least, are subjects of the United States: whereas this vessel, the *Argonaut*, was in part the property of a natural-born subject of this country, and this part-owner was also the master: consequently she was not owned by a subject of the United States, nor navigated by a master a subject of the United States, within the true intent and meaning of the navigation laws, and particularly the statute 37 Geo. III. c. 97. The conclusion will be the same. The voyages insured were therefore illegal and the policies void. This is the only point in the case which has appeared to me to have any difficulty in it. I must confess that when I found it stated as a fact in this special verdict that Collet and Butler were natural-born subjects of His Majesty, I felt myself embarrassed, and I could not readily disengage myself. And when I found that in the year 1797 there had been a reference from the Privy Council to the then Advocate-General, and the two law officers of the Crown, and that they had concurred in opinion that the master of an American vessel, a subject of the United States domiciled there, but in fact a natural-born subject of Great Britain, was not to be considered as a subject of the United States within the meaning of our navigation laws, founding themselves upon an opinion of Lord Hardwicke when he was Attorney-General, and that the Council had adopted and acted upon that opinion, I felt my difficulty increase upon me; for, though this was not a judicial decision, (as in the argument at the bar of the Court of King's Bench it was supposed to be,) it was certainly of the highest authority next to a judicial decision: it was a public act of the Executive Government, founded on the advice of eminent and learned men,

whose situations called upon them to make themselves well acquainted with our navigation laws, and must have made them very familiar with all the questions which had arisen upon those laws: and it was therefore entitled to very great respect from me. It may be observed that this order might have been followed by a judicial decision. It purports to recommend that under the actual circumstances the vessel [*515] should be admitted *to an entry though she was not navigated according to law. Notwithstanding the order, and the entry in consequence of it, the vessel might have been seized and prosecuted in the Exchequer, and so the question might have been brought to a judicial decision. It was done in the case of *Scott qui tam v. Schwartz*, Com. 677, cited in the argument. By the way, I do not understand upon what ground the case of *Butler* was distinguished from *Collet's* case, unless *Butler* has been expressly discharged from his allegiance by Act of Parliament, in consequence of our acknowledgment of the independence of the United States. They were both natural-born subjects, they were both adopted subjects of the United States, and it is to be said of both *Nemo patriam in qua natus est exuere, nec legeantix debitum ejurare possit*. It was observed by Lord Hale, that a natural-born subject of this country may by foreign neutralization entangle himself in difficulties and a conflict of duties. So may the naturalized or denizen subject of the King of Great Britain. Yet it is clear, that we and all the civilized nations and States of Europe do adopt (each according to their own laws) the natural-born subjects of other countries. So as I take it, Vattel puts it in the passages referred to. Our laws give certain privileges and withhold certain privileges from our adopted subjects, and we may naturally conclude, that there may be some qualification of the privilege in the laws of other countries. But our resident denizens are entitled, as I take it, to all sorts of commercial privileges which our natural-born subjects can claim. We should consider them as English in the language of the Navigation Act. The United States do undoubtedly consider their adopted subjects as subjects of the United States within their laws. And I take it that we should consider their adopted subjects, if they happen not to be natural-born subjects of the King of Great Britain, as subjects of the United States within our navigation laws. To this proposition I take case of *Scott v. Schwartz*, to be in point, if it wanted an authority. The case now begins to work itself clear. It comes to this question: what difference does the circumstance of the adopted subject of the United States being a natural-born subject of the King of Great Britain make? Is there any general principal in the law of nations (out of which this adoption of subjects seems to have grown) that in the parent State the adopted subject is incapable of enjoying the privileges which have been conceded by the parent State to the other subjects of that State which has adopted him? I know of no such disabling principle. Let us then come to our own municipal law. Lord Hale says foreign naturalization may involve the natural-born subject in a conflict of duties. This is eloquence but not precision. What are the duties of which there may be a conflict? Our laws pronounce, that if there should be war between his parent State and the State which has adopted

him, he *must not arm himself against the parent State. Perhaps they go further and say, that if he is here he may be prevented [*516] from returning to his domicile in the State which has adopted him: that if he is there, he must on receiving the King's commands under his privy seal, return hither on pain of incurring a contempt and penalties consequent upon it. Whether the proclamation which has been introduced into this cause will have the same effect as a privy seal served upon the party, is a question not necessary to be here discussed. It cannot have a greater effect, nor an effect of a different nature, and may therefore be laid out of the case. Our municipal laws may attach upon him in some other cases, but I conclude in no instance which by analogy can govern the present case, because I have heard of no such argument from analogy. Upon what authority then is it said, that a natural-born subject of the King of Great Britain shall not trade to the East Indies, though he is an adopted subject of another country whose subjects in general are allowed to trade to the East Indies? Shall it be enough to say the rest of the King's subjects are not allowed to trade to the East Indies, and therefore you being the King's subject shall not? He will answer, I have the privilege which the rest of the King's subjects have not. I am the King's subject, but I am also the subject of the United States, and Great Britain has granted to the subjects of the United States that they may trade. He may add, I violated no law of my parent State, in procuring myself to be received a subject of the United States. She encourages the practice, for she herself adopts the subjects of other States. Why then are the fruits of my adoption to be withheld from me? If it be said to him, you a British subject ought not to trade to the loss and injury of the East India Company who have a monopoly, he may say, the subjects of the United States may and ought to carry on this trade under the authority of the laws of this country; under the authority of the same laws which gave to the East India Company their monopoly. If the Company sustain a loss, it is *damnum sine injuria*. In short, it being once granted that a natural-born subject of the King of Great Britain may become a subject of the United States, there can be no breach of moral, political, or legal duties, no conflict of duties in claiming or exercising the privileges which belong to that character. The same train of reasoning, in my judgment, goes to prove that it is not yet sufficiently established to be now taken for clear law upon the ground of which we ought to declare these contracts void, that a natural-born subject of the King naturalized, or otherwise adopted as a subject by a foreign State, is not to be considered within our navigation laws as a subject of that foreign State when acting in the character of the master of a vessel belonging to the subjects of that foreign State. Such a man is certainly to many purposes, "of that country or place" *which are the words of the Navigation Act, and "a subject of the United [*517] States," which are the words of the stat. 37 Geo. III. c. 97. In point of title to this character of subject, he is sufficiently so within our navigation laws. I mean that he is sufficiently adopted, according to the case in *Comyns*, to be considered a subject of that country within our navigation laws, supposing his claim not to be repelled by his being a

natural-born subject of Great Britain. I am not prepared to say, highly as I respect the authority of those who held that opinion, that this character of natural-born subjects will control or suspend the legal operation of that of a subject of the United States. There is here no conflict of duties. Both characters may stand together; and if some political inconveniences, such as those suggested in the argument before us, (though these seem very remote,) should follow, yet if these inconveniences are not of consequence enough to prevent the practice of the adoption of subjects by Great Britain and every other State in Europe, we cannot satisfy ourselves that they ought to control the legal consequences of that adoption. We are of opinion that there is no error in this judgment, and that it ought to be affirmed.' "Judgment affirmed."(*q*)

No. 5.

THE JONGE JOSIAS.(*r*)

"THIS was a Danish ship, which with several others had been seized by Admiral Berkley, in the Tagus, on the 24th of February, 1809, and sent to England for adjudication. In the first instance a claim of territory had been advanced by the Portuguese Consul, but that was withdrawn, and the question now arose upon a claim which had been given in on behalf of the master for three eighth parts of the ship, his property, as protected under the XVIth Article of the Convention of Cintra. The article provides 'that all subjects of France, or of Powers in friendship or alliance with France, domiciliated in Portugal, or accidentally in the country, shall be protected; their property, of every kind, moveable and immoveable, shall be respected; and they shall be at liberty either to accompany the French army or to remain in Portugal. In either case their property is guaranteed to them, with the liberty of retaining or of [**518*] disposing of it, and of passing the produce of the *sale thereof into France, or any other country where they may fix their residence, the space of one year being allowed them for that purpose. It is fully understood, that shipping is excepted from this arrangement, only however in so far as regards leaving the port, and that none of the stipulations above mentioned can be made the pretext of any commercial speculation.' It was stated in the claim, that the ship entered the port of Lisbon some time in August 1807, prior to the declaration of hostilities on the part of England against Denmark, and also prior to the occupation of Lisbon by the French, and that she remained there unmolested until she was seized by Admiral Berkley.

"*On behalf of the Claimants.*—A letter from Admiral Cotton, who commanded off the Tagus in August 1808, was relied on to show that he had not acted against these vessels after, or in consequence of the Convention of Cintra; and it was contended generally, that as these Danish masters were the subjects of a Power in amity with France, and accident-

(*q*) Mr Justice Buller was absent from the 20th, and Mr. Justice Heath from the 24th of April to the end of the term, from indisposition.

(*r*) 1 Edward's Admiralty Reports, 128-134.

ally in the country, they came fairly within the simple construction of the Treaty, and were entitled to protection under it so long as they remained in port. That the only exception with respect to shipping related to their quitting the port, and that it was clear, from the exception itself, that property of that description was within the intent and meaning of the contracting parties.

“For the Captors.”—It was urged that the proviso as to shipping must be taken with reference to the context, and could have this meaning only; that if any persons included in the preceding part of the article happened to be possessed of any property in shipping, the protection should also extend to that description of their property. That the article evidently referred to such persons as were adherents to the French cause in Portugal, and not to persons going there on other grounds and with other views. That the permission to dispose of the property, and to pass the proceeds into France, or any other country where they might fix their residence, showed that the article was not intended to apply to this description of persons. That it was an interpretation sufficiently large to admit that it extended to all persons holding connection with the French during the time they were in possession of the country, and could not be extended to cases not in the contemplation of the contracting parties, nor within the sound interpretation of the words employed in the instrument which they had constructed.

“JUDGMENT.

“Sir William Scott.—‘I am called upon to decide this question, and every consideration of public policy and of tenderness for the parties interested, makes it proper for me not to delay giving the opinion of the Court upon the legality of the claim which has been submitted to its consideration. In the first instance, a claim* was given by the Portuguese Government for these vessels, as having been taken in [519] violation of the territorial rights of that nation. But it has been withdrawn, and consequently there is an end of any protection which these Danes can derive from a pretension so introduced, it being an established law that the claim of territorial right can be advanced only by those to whom the territory belongs; the subjects of other States can do no more than refer themselves for redress to the neutral Power under whose rights they hoped to find protection. The parties, however, have set up a claim under the stipulations of the Convention of Cintra, which, it is assumed, are applicable to the property of these Danish masters of vessels. Now I think there is a question preliminary even to this, namely, whether the stipulations of a Treaty can be set up by those who were not parties to it. The French, who were parties to the Treaty, might undoubtedly, though they are enemies, contend for that construction which they might allege was in the intent and meaning of the contracting parties at the time, and they have a right to demand the application of the Treaty so construed, to those persons on whom they meant to confer protection. But whether others who have no rights as parties to that Treaty, but who are indirectly benefited by it, are competent to contend for its fulfilment, is, I think, more than doubtful. Taking it, however, that these Danish masters

are competent to claim under the Treaty, the question then is, whether the construction here contended for, is that which the Court would be warranted in adopting. For although the Court might be disposed to put a favourable interpretation upon the articles of the Treaty, it is bound to construe them according to their natural and fair meaning, and not to impose upon the contracting parties stipulations which were never in their contemplation. The business of the Court is to expound and explain, not to frame original Treaties. Now it is a feature of the Convention of Cintra, very illustrative of its real character, that it is a Treaty for the military evacuation of Portugal by the French army, and that the parties to it are the commanders of the respective armies. That is a circumstance which impresses a strong conviction that this Treaty has no direct reference to maritime interests, and ought not to receive such an application, unless it is distinctly expressed. If there are any articles pointing to the immunity of these vessels, the Court would be inclined to give them full effect and not to construe them with a punctilious hesitation and scrupulosity, respecting the competence of the authority under which they were framed. But in general, the fact that it was drawn up by military persons, and for great military purposes, does give the Treaty a character which is useful as expository of its true meaning. The maritime department was separate and distinct, and under a distinct authority; unless, therefore, there are articles that do expressly point to maritime

[*520] objects, it is *reasonable to conclude that they were not in the contemplation of the parties themselves. Taking that as a fair rule of exposition, I am to consider the effect of the XVIth Article of the Treaty, as applied to the claims of the masters of these Danish vessels, which were lying in the Tagus at the time; and it would certainly be a singular circumstance if the French generals had stipulated for the protection of the property of these persons who happened to be upon the spot, amounting only to a small part of the vessels, without making any provision for the remaining parts of those vessels, which were equally the property of the allies of France, though not personally in Portugal at that time. The words of the article are these, "that the property of persons domiciliated, or accidentally in the country, shall be protected;" and under this description it is said, that these persons are to be considered as being accidentally in the country, and that therefore they come within the provisions of this article. The words are certainly large, but I must again refer to what I before observed, that this is a Treaty applicable to military affairs, to the exclusion of every object of maritime policy. Under the terms "domiciliated," these Danish masters certainly do not come: do they then under the other description of persons "accidentally in the country?" If these words stood alone, with the strong disposition I feel to give them the most favourable construction, I should, though not perhaps without doing some violence to their meaning, be inclined to hold that these persons, being on board their ships in the port of Lisbon, might be included under the terms "accidentally in the country." I should under that disposition be inclined to hold, that the word "accidentally" applied to all persons in a situation contra-distinguished from domiciliated, though perhaps more immediately to persons attending on

the armies, or on visits, or residing there for the purposes of business, pleasure, or curiosity. It would require, however, all the indulgence, which I admit the personal circumstances of the case call for, to include under the description, masters of ships coming merely to the port, and not to the country. But when I look to the context, I think it results in the clearest manner, that the words never were intended to convey such a meaning; for how does the article go on? "That they shall be at liberty to remain in Portugal, or to accompany the French army." That is the alternative: now what kind of option is this, what prospect does the permission to accompany the French army, or to remain in Portugal, hold out to these Danish masters? They could only remain by giving up their vessels and their employment; and as to following the French army, it is quite ridiculous, when applied to persons so circumstanced. The article then goes on in the same strain, "that they shall be protected, and may be at liberty to transfer themselves to France, or any other country, in which they may wish to fix a residence." Now these are persons *who have a fixed residence already in their own country; they have no wish to remove to France, which is entirely out of all [*521] contemplation with them, or to any other country but their own; they have no intention of disposing of their shares in these vessels, still less of remaining in Portugal. Neither the one nor the other of these alternatives can, without a ludicrous perversion of the terms, be applied to these persons, or to the property of masters of vessels, who come to the port only to go back again, and it is evident that they were wholly out of the view of the contracting parties. Then follow the words "shipping is included" in this article, which has very justly been described as clouded in some of that obscurity which hangs over no small portion of this Treaty. But I do not understand those words as enlarging the description of persons meant to be benefited. The interpretation which I put upon the words is this: there are a great number of foreign merchants residing at Lisbon, many of whom are possessed of shipping, and the ships of such persons who are themselves protected by the preceding part of the article to which these words must refer, are to be protected also; it being stipulated that if they send the ships out to sea, they shall "not carry off their property without being under the view of those who have a right to guard against any abuse of the indulgence." Under these considerations, and not without considerable pain, I feel myself bound to construe the Treaty in a manner unfavourable to the claimants, and to hold that it does not extend to the protection of their property in these vessels, which I am satisfied was not within the view of the persons who framed the Convention. There are circumstances in the case which entitle this unfortunate class of men to the utmost indulgence from those who may be ultimately benefited; but at present it is my public duty to pronounce that their property in these vessels is not protected under the Treaty.'"

No. 6.

SUTTON V. SUTTON.^(s)

Under the Treaty of 1794, between Great Britain and America, and the Act of the 37 Geo. 3, c. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens, but as native subjects of Great Britain.

“THIS was a bill for the specific performance of a contract; and the Master having reported against the title, an exception was taken to his report, which now came on to be argued.

“The title of the vendor was derived under a conveyance from a citizen of America; and the question was, whether, under the circumstances of this case, and in relation to the property which ^[*522] was the subject of the contract, an American citizen was, to be deemed an alien?

“Samuel Strudwick, before and at the time of the separation of the United States of North America from Great Britain, was settled in North Carolina, and he continued to reside there, as an American citizen, till his death in 1794. By his will, dated in that year, he devised to ‘his good friend Margery, widow of Stephen ———, lately living at Fulham in England, his houses and lands in the city of London, in trust to be sold, when Mr. Vaughan’s annuity shall drop in, and the moneys arising from such sale to be employed as therein mentioned:’ and, after bequeathing two small annuities, he gave the residue of his real and personal estate to his son William Francis Strudwick. A part of this testator’s property consisted of an undivided share of certain tenements in the city of London, which were the subject of the present suit. A person of the name of Margery Bourget was considered to be the devisee referred to in the will: she declined to carry the trust into effect, or to interfere in the management of the property, and was said to have died about the year 1806. William Francis Strudwick, the heir at law and devisee of Samuel, was an American citizen, and died intestate in the year 1810, leaving Samuel Strudwick, also an American citizen, his eldest son and heir at law. In 1819, the last-mentioned Samuel Strudwick sold and conveyed his undivided share of the tenements in the city of London; and upon this conveyance the title of the vendor depended.

“One of the objections taken to the title was in the following words:—‘That Samuel Strudwick, the vendor, in 1819, of two eighth parts of the estate, was an alien, and incapable of conveying them, such shares having been the property of Samuel Strudwick, his grandfather, who was settled in America at the time of the separation of the two countries in 1783, and who was alleged to have devised them to his son William Francis Strudwick, who was an American, and died there in 1810 intestate, leaving the said Samuel Strudwick, the grandson, his heir at law; and that no proof had been shown that, after the separation, Samuel

(s) 1 Russell & Mylne’s Reports, 663.

Strudwick, the grandfather, or Willian Francis Strudwick, was a subject of the King of Great Britain.'

"The question turned upon the construction of the Treaty of Peace between Great Britain and the United States, signed at London, on the 19th of November, 1794, and of the 37 Geo. III. c. 97., which was passed for the purpose of carrying the Treaty into execution.

"By the first article of that Treaty it was agreed, 'that there should be a firm, inviolable, and universal peace between Great Britain and the United States.'

"The second article, after some regulations relative to the withdrawal of the British troops, declared, 'that the settlers and *traders within the precincts of the posts from which the British troops [*523] were to be withdrawn, should continue to enjoy their property of every kind, and be at liberty to remain there, or to remove their effects, and to sell or retain their lands and property at their discretion; that such of them as should continue to reside within the boundary line, should not be compelled to become citizens of the United States, or to take any oath of allegiance to the Government thereof, but should be at full liberty so to do, if they thought proper, and should declare their election within one year after the evacuation aforesaid; and that all persons who should continue there after the expiration of the year, without having declared their intention of remaining subjects of His British Majesty, should be considered as having elected to become citizens of the States.'

"The third, fourth, and fifth articles related to the boundaries of the new States, the navigation of the rivers, &c.; and the sixth, seventh, and eighth, to the adjustment of the pecuniary claims of individuals.

"The ninth article enabled the subjects of either country to hold lands in the other, and to sell and devise them as if they were natives. The terms of it, relative to Americans holding lands in England, were, 'that American citizens, who then held lands in the dominions of His Majesty, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell, or devise the same to those whom they should please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens.'

"And by the tenth article it was stipulated, 'that neither debts due from individuals of the one nation to the individuals of the other, nor shares nor moneys which they might have in the public funds or private banks, shall, even in any event of war or national differences, be sequestered or confiscated; it being unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other, and in their respective Governments, shall ever be destroyed or impaired by national authority, on account of national differences and discontents.'

"The subsequent articles of the Treaty, down to the twenty-eighth, contained various stipulations relative to navigation, and the mutual delivery up to justice of persons charged with murder or forgery. The twenty-eighth article declared, 'that the first ten articles of the Treaty

should be permanent, and that the subsequent articles, except the twelfth, (which related to the intercourse with the West Indies, and was to continue in force for two years after the then war,) 'should be limited in their duration to twelve years, to be computed from the day on which [524] the ratifications *of the Treaty should be exchanged, subject to the renewal of the negotiations at a period therein mentioned; but if His Majesty and the United States should not be able to agree on a new arrangement, in that case all the articles of the Treaty, except the first ten, should then cease and expire together.'

"In 1797, the 37 Geo. III. c. 97, was passed, which is intituled, 'An Act for carrying into execution the Treaty of Amity, Commerce, and Navigation, concluded between His Majesty and the United States of America.' It contained the following clauses:—

"Sect. 24. And whereas by the ninth article of the said Treaty, it was agreed that British subjects who then held lands in the territories of the said United States, and American citizens who then held lands in the dominions of His Majesty, should continue to hold them according to the nature and tenure of their respective states and titles therein, and might grant, sell, or devise the same to whom they should please, in like manner as if they were natives; and that neither they nor their heirs or assigns should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens: be it therefore enacted by the authority aforesaid, that all lands, tenements, and hereditaments in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which, on the said 28th of October, 1795 (being the day of the exchange of the ratification of the said Treaty between His Majesty and the said United States,) were held by American citizens, shall be held and enjoyed, granted, sold, and devised, according to the stipulations and agreements contained in the said article; any law, custom, or usage on the contrary notwithstanding.

"Sect. 25. Provided always, that nothing herein contained shall extend, or be construed to extend, to give any right, title, or privilege to any person, not being a natural-born subject of this realm, which such person would not have been entitled to if this Act had not been made, other than and except such rights, titles, and privileges as shall be necessary for the true and faithful performance of the stipulations in the said article contained, according to the true intent and meaning thereof, or to give to any person, not being either a natural-born subject of this realm, or a citizen of the said United States, any right, title, or privilege to which such person would not have been entitled if this Act had not been made.

"Sect. 27. That this Act shall continue in force so long as the said Treaty between His Majesty and the United States of America shall continue in force, and no longer.'

"This Act was continued by the 45 Geo. III. c. 35, which, after reciting that the 37 Geo. III. c. 97, 'was to continue in force so long as the said Treaty should continue in force, and no longer, which Treaty, [525] or so much of it as relates to the matters *contained in the said Act, has now ceased and determined: and it is expedient that

the liberty of navigation and commerce between the people of this kingdom and the people of the United States of America should continue for a limited time, in the same manner and under the same limitations and conditions as are specified in the said Act,'—enacted that 'the said Act, and every thing therein contained, shall, notwithstanding the said Treaty has ceased and determined, be deemed and taken to be and to have been in full force and effect, and shall so continue in force until the 1st of June, 1806.'

"The 37 Geo. III. c. 97, was subsequently continued from time to time by the 46 Geo. III. c. 16, and 47 Geo. III. sess. 2, c. 2, and, finally, by the 48 Geo. III. c. 6, to the end of the then present session of Parliament. That session terminated in the same year; and no Act was afterwards passed to revive or prolong the operation of the Treaty.

"The point argued was, whether the twenty-fourth section of the 37 Geo. III. c. 97, taken in connection with the ninth article of the Treaty, continued in operation, so as to remove the incapacity of holding and transmitting lands in England which would otherwise have attached on William Francis Strudwick and Samuel Strudwick, the grandchildren, as aliens.

"Mr. Bickersteth, Mr. Pemberton, Mr. Tyrrel, Mr. Wright and Mr. Wood, in support of the objection to the title.

"The Treaty of 1783 dissolved the tie of allegiance which had previously subsisted between the Crown of England and the individuals who then became American citizens; they and their descendants, born out of the British Dominions, were thenceforth aliens; and, accordingly, *Doe v. Acklam*,^(t) has established, that a person born in the United States since 1783, cannot inherit lands in England. *Doe d. Auchmuty v. Mulcaster*.^(u) William Francis Strudwick, and Samuel Strudwick, the grandson, were clearly aliens. The only distinction between the present case and that of *Doe v. Acklam* is, that the freehold of the tenement in question was not in an English subject on the 28th of October, 1795, but in an American citizen. Now it is true, that, as to such lands, the incapacity of alienage was removed by the 37 Geo. III. c. 97; and so long as that statute was in operation, American citizens might hold, grant, sell, or devise these lands in the same manner as if they were natives. But by the twenty-seventh section the Act is to continue in force only so long as the Treaty shall be in force, and no longer; and the single question therefore is, whether the Treaty was or was not in force in 1819. On this point we have a legislative declaration in 1805. *The 45 Geo. III. c. 35, says in the preamble, 'which Treaty, or so [*526] much of it as relates to the matters contained in the said Act (i. e. the 37 Geo. III. c. 97,) has now ceased and determined;' and, among the matters contained in the said Act, was the stipulation for excluding the incapacity arising from alienage; and the same statute declares in the enacting clause, that, 'the said Treaty has ceased and determined.' By that statute, and two subsequent Acts, the 37 Geo. III. was revived, both retrospectively and prospectively; but it finally expired with the session of 1808. In 1812 war broke out between the two countries, which con-

(t) 2 B. & C. 779.

(u) 5 B. & C. 771.

tinued to rage till a new Treaty was concluded in 1814. It is impossible to suggest that the Treaty was 'continuing in force' in 1813; it necessarily ceased with the commencement of the war. The 37 Geo. III. c. 97, could not continue in operation a moment longer, without violating the plainest words of the Act. William Francis Strudwick became then and remained ever afterwards subject to all the incapacities of alienage.

"It was said before the Master, that the first ten articles of the Treaty were to be 'permanent,' which was construed as synonymous with 'perpetual;' but that is a construction which the twenty-eighth article does not admit of. The very first article is, 'that there should be a firm and universal peace between Great Britain and the United States;' that is the first of the articles supposed to be ever-enduring. Yet what became of it in 1813? There are many of the stipulations of the first ten articles which could not possibly be observed in a state of war. The word 'permanent' is used, not as synonymous with 'perpetual or everlasting,' but in opposition to a period of duration expressly limited. The greater number of the articles of the Treaty were to cease at the expiration of twelve years; the first ten were not to expire then, by the mere lapse of time, they were to continue so long as a Treaty of peace was in force; but when war took the place of peace, and the Treaty had no longer any existence, the ninth article could not continue in operation.

"Even if it were to be held, in consequence of the language of the twenty-eighth article, that the intention of the framers of the Treaty was to make the ninth article perpetual, there is nothing in the Act of Parliament to give it that endurance. The Act makes no mention of the twenty-eighth article of the Treaty, which remains, therefore, a mere stipulation of the Crown, and cannot create or extend an exemption from any disability imposed by the law of the land. The continuance of the exemption could not be prolonged beyond the duration of the Act: the Act was to endure only so long as 'this Treaty,' that is, the Treaty of amity, commerce, and navigation concluded between His Majesty and the United States of North America, should be in force; and, most unquestionably, [*527] that Treaty was not in force, when His Majesty and the United States were carrying on hostilities against each other both by sea and land.

"The construction contended for on the other side would lead to most inconvenient results. One consequence of it would be, that all the lands which, on the 28th October, 1795, belonged to Americans, are taken for ever out of the operation of the general law of England, and may, in all time to come, be transmitted to aliens by descent, devise, or conveyance.

"Mr. Wigram, in support of the same line of argument, submitted that the Treaty could not be deemed to be in force, unless it was in force as a whole; that it could not be in force as a whole, after the most important provisions in it had been broken; and, on the contrary, that it ceased to be in force as a whole, when the peace, the stipulation for which constituted the basis of the arrangement, was exchanged for a state of war. He cited Vattel,(x)—'We cannot consider the several articles

of the same Treaty as so many particular and independent Treaties : for, though we do not see the immediate connection between every one of these articles, they are all connected by this common relation, that the contracting Powers pass them with a view to each other, by way of compensation. I should never, perhaps, have passed this article, if my ally had not granted me another, which, in its own nature, has no relation to it. Every thing comprehended in the same Treaty has then the force and nature of reciprocal promises, at least if they are not excepted in due form. Grotius says, very well, that all the articles of a Treaty have the force of conditions, which by a default are rendered null.'

"Mr. Preston and Mr. Dixon, Mr. Tinney and Mr. Garratt, in support of the title.

"The Treaty contains articles of two different descriptions; some of them being temporary, and others of them being intended to be of perpetual obligation. Of those which were temporary, some were to last for a limited period; such as the various regulations concerning trade and navigation; and some were to continue so long as peace subsisted, but being inconsistent with a state of war, would necessarily expire with the commencement of hostilities. There were other stipulations, which were to remain in force in all time to come, unaffected by the contingency of peace or war. For instance, there are clauses for fixing the boundaries of the United States. Were the boundaries so fixed to cease to be the boundaries the moment that hostilities broke out? The tenth article provides that debts due to individuals, and moneys which they may have in the public funds or private banks, shall not be confiscated in the event of war: that is a stipulation which, from the nature of things, as well as from the plain import *of the terms, was to be a binding obligation in war as well as peace; for it was only to a state of war that [*528] it was at all applicable; and, in sound construction, a similar force must be given to the immediately preceding article, on which the present question arises. It was intended to provide for the inconvenience which must naturally arise from the division of one empire into two independent States, the subjects of each of which held property situated within the territorial limits of the other; and with that view, it declares that American citizens, who then held lands within the dominions of His Majesty, should continue to hold them, and have power to grant, sell, or devise them as if they were natives, and that neither they, nor their heirs or assigns, should, in respect of their lands, be regarded as aliens. The effect of it is to exclude, and to exclude for ever, the principle of alienage as to certain persons and certain lands: there is no limitation to its operation; it is not confined to a state of peace, or to the individuals who then held the lands; it includes their heirs and assigns: they, their heirs and assigns, are, with respect to such lands, to be considered as natives; and being considered as natives, their title to hold the lands could not be affected by the breaking out of war between the two countries. The twenty-fourth article tends still further to show that some of the stipulations, and among these the ninth article, were meant to be of perpetual endurance.

"Now the effect of the twenty-fourth section of the Act of Parliament

is to give the force of law to the ninth article of the Treaty; and if that article, according to the sound construction of the Treaty, was to be of perpetual obligation, the enactment of the legislature, carrying into effect that which the King had agreed to do, but which his prerogative was not competent to accomplish, has declared that Americans who held lands within the dominions of His Majesty on the 28th of October, 1795, their heirs and assigns, shall in all time to come hold and enjoy them as natives. It is true that the twenty-seventh section has said, that the Act shall continue in force only so long as the Treaty of peace continues in force; but that section must necessarily be confined to those stipulations which were either of limited duration, or were in their nature such as to be entirely dependent on the existence of peace.

"It has been argued, that recitals contained in the 45 Geo. III. c. 35, and the two subsequent acts, have put a legislative construction on the 37 Geo. III. c. 95, and have declared that the Treaty, and consequently the latter Act, had ceased and determined. But the operation of a statute is not to be restrained by the recital of a subsequent statute. Dore [*529] v. Gray.(y) Besides, *the acts of the 45 Geo. III. and the following years, contemplated only those provisions of the Treaty which related to commerce and navigation, and were to expire at the end of twelve years, unless they were expressly renewed for a further period.

"The ninth article was more beneficial to English subjects than to American citizens; and any restriction of its fair operation would be a public mischief, inasmuch as it would naturally lead America to adopt a similar restriction of the reciprocal privilege granted to subjects of the British Crown.

"Suppose that an American citizen who, on the 28th October, 1795, held lands in England, died, leaving an elder son born in America, and a younger son born in England. Had the Treaty and the Act not been made, the younger son, on the father's death would have inherited the lands: under the Treaty and the Act the eldest son was heir, and as such entitled to the property. Is it to be said that, if a war afterwards break out, his interest is to cease, and a title is to accrue to the Crown, which never could have had a pretext of claim, if the devolution of the property had been regulated by the Common Law?

"Mr. Bickersteth, in reply.

"The Master of the Rolls.

"The relations which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the Treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property, and the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the Treaty that the operation of the Treaty should be permanent, and not depend upon the continuance of a state of peace.

“The Act of the 37 Geo. III. gives full effect to this article of the Treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the Act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the Act is to continue in force so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the Act only as would in their nature depend-upon a state of peace.

“I am of opinion, therefore, in favour of the title, and consider that the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of the 37 Geo. III. are, as far as regards these lands, to be treated, not as aliens, but as native subjects.’”

*No. 7.

[*530]

MALTASS V. MALTASS.(z)

(Judgment by Dr. Lushington)

“THE present inquiry relates to the personal property of John Maltass, who died at Smyrna, in the year 1842. The case comes on for judgment on an allegation, given in on behalf of a son, propounding a will executed in the year 1834; the only evidence in the cause being the answers of the widow, the other party in the cause.

“My attention must be first directed to what I consider the admitted facts of the case. The deceased was born at Smyrna, of English parents, who must, I think, be presumed to have been born British subjects. The deceased is admitted to have passed his boyhood in England for the purpose of his education; he went back to Smyrna where his father was engaged in trade. The deceased for many years was occupied in commercial pursuits, and was a member of a firm established at Smyrna, but which was dissolved a considerable period before his death. Whether the deceased, up to the period of his death, or even during the latter years of his life, was engaged in trade, I find no evidence, save that he described himself as a British merchant in his will; I have looked to the estimates of his property during the latter period of his life, I find some dark indicia that he was engaged in commercial concerns, but nothing to lead to a legal conclusion that he was engaged in trade at the time of his death. He married at Smyrna, was constantly resident there, and died there, leaving a widow and several children.

“I have to determine, upon these facts, what is the law to govern the succession to his personalty—the law in this respect being the same, whether he has died testate or intestate. The first question I propose to consider is, whether, laying aside the question of domicile, the deceased was or not a British subject? Now assuming him to have been born of

(z) Robertson's Ecclesiastical Reports pp. 70-81. See also, 3 Curteis, 231.

parents who were British subjects, the deceased, although born abroad, would be a British subject, and would owe allegiance to the Crown of Great Britain, and this, whatever might be the domicile of his parents or of himself; the only excepted cases that I know of are those of the peculiar instances of the children of persons whose domicile was in the United States, prior to the acknowledgment of the independence of America. Such are the cases of *Doe v. Aclom*(a) and *Doe v. Mulcaster*.(b)

“The next question is, where was the deceased domiciled? for [*531] *I take it not to be denied, that the law of domicile must in some shape govern the succession. But this inquiry will become unnecessary if it should turn out that, with respect to this individual succession, the law of Great Britain and of Turkey is the same; for when we speak of the law of domicile, as applied to the law of succession, we mean, not the general law, but the law which the country of domicile applies to the particular case under consideration. Such law may be totally different as applied to a natural-born subject of the country, as exemplified in the case of *Collier v. Rivaz*.(c) There the testator died domiciled in Belgium; but, by the Belgian law, the succession in that case was not to be governed by the law of Belgium, applicable to natural-born subjects, but by the law of that country, applicable to an English-born subject dying domiciled in Belgium.

“Assuming, therefore, that the deceased died domiciled at Smyrna, the first point is,—what is the law of Turkey as to British subjects dying domiciled there? This depends on the construction to be put on the Treaties between Great Britain and the Porte. The leading object of these was to protect British subjects trading to Smyrna, and, with this view, to modify the law of Turkey so as to ensure them justice, so far as could be attained. It is, I think, perfectly clear, from the Treaty, independent of all historical facts, that a residence in Smyrna by a British merchant was contemplated, and, if the contracting parties have provided for the case of residence, it seems necessarily to follow, that they must have intended to provide for the case of domicile, if domicile in Turkey could be acquired by the same means as in other countries. Judge Story says:—“That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.” If this be applicable to a domicile in Turkey, such a case must have occurred in the course of trade; and, therefore, I conceive it must, in legal contemplation, have been included when the parts of the Treaty applicable to British subjects trading in Turkey came to be considered. I the more incline to this opinion, because, however short might have been the residence of British merchants in Turkey in the earliest times, the fact of their permanent residence for many years is undoubted, and some of the Treaties bear date long after such permanent residence existed. It never could, I think, be supposed that the Treaties did not intend to protect British merchants, either com-

(a) 2 Barnwell & Cresswell, 779.

(c) 2 Curteis, 855.

(b) *Ib.* 771.

posing a house of trade, or carrying on business singly, who for years together resided in Smyrna, having no other habitation, and without any intention of quitting Smyrna, or, in other words, domiciled according to Judge Story's definition.

“If it be contended, that, at the time of concluding the Treaties, *neither party thought of British subjects domiciled in Smyrna, [*532] that may perhaps be true, for little indeed was known or thought of domicil, in the legal sense of the term, in those early times; but if the words of the Treaty are sufficient to cover the case, and if the object of the Treaties was to apply to all British merchants, then the application to a state of circumstances not particularly contemplated, but within the general scope of the Treaties, would not limit their construction. It would not be a *casus omissus*, but simply the use of general terms to attain a particular object, the particular circumstances which should call the compact into action not being foreseen; but the general forms intended to govern all cases falling within the principle, whether seen or not seen. It appears to me that the passages in the Treaties which I shall presently cite are so wide in their terms as to comprise all British merchants resident in Smyrna, and that the only exception (which proves the universality,) is the case of a British subject becoming a Mussulman.

“Perhaps, also, there may be another reason why words distinctly appropriate to domicil were not used; namely, both parties considered domicil in that sense all but impossible, because the sense they would have attributed to it would be a total abandonment of British character. The reasons why they may have so thought I will presently shortly discuss.

“I think, before I close this branch of my subject, that there are arguments of no small weight leading to this construction of the Treaties. Even at this day, although so many powerful minds have been applied to the question, there is no universally-agreed definition of the word domicil—no agreed enumeration of the ingredients which constitute domicil. This is expressed in the following remarkable language by Hertius: “*Verum in iis definiendis mirum est quam sudant Doctores.*”(d) Indeed, I think there are no less than fourteen or fifteen different definitions of this word. The gradation from residence to domicil consists both of circumstances and intention; nice distinctions have and must prevail, such as cannot be defined beforehand. Hence, if the Treaties did not apply to domicil, as residence would often become fused into domicil, British merchants, and, in case of their deaths, their families, would find themselves suddenly, and contrary to their intention, and to the presumption of intention, subject to a code of laws wholly contrary to their religious persuasions, their feelings, customs, and contemplation in making arrangements for the welfare of themselves and families; and, be it observed, the law of Turkey would come into operation (if residence became domicil,) not only on property after death, but during the life; and an individual might be living in Turkey out of the pro-

(d) 1 Hertius, Oper. s. 4, n. 3, p. 120, (edit. 1716.)

tection of any Treaty. I know not what would be (if the case were [*533] capable of arising the law of Turkey applicable *to British merchants so domiciled, but certainly entire subjection to Turkish laws would be a grievous evil to British merchants of Christian belief, education, and habits. *

“All these reasons appear to me to operate most strongly in favour of a liberal and extended construction of the Treaties; in my opinion the contracting parties never contemplated the anomaly which a contrary construction would lead to.

“With regard then to the parts of the Treaties applicable to the question we are now discussing, to wit, whether the Treaties extend to a permanent residence, and not merely to a temporary visit. The Treaties commence at an early period, but they are all included in the Treaty of the Dardanelles (1809.) Now, in the construction of Treaties of this description, we cannot expect to find the same nicety of strict definition as in modern documents, such as deeds, or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy, but rather to adopt more liberal terms. I think, in construing these Treaties, we ought to look at all the historical circumstances attending them, in order to ascertain what was the true intention of the contracting parties, and to give the widest scope to the language of the Treaties, in order to embrace within it all the objects intended to be included.

“The first begins by stating, “that there had existed a good understanding and an amity between the King of England (Charles II.) and the Porte. And it was granted to him (Charles II.) that his subjects and their interpreters might safely and securely trade in these our dominions.” The first article stipulates: “that the English nation and merchants, and all other merchants sailing under the English flag, with their ships and vessels, and merchandize of all descriptions, shall and may pass safely by sea, and go and come into our dominions, without any the least prejudice or molestation being given to their persons, property, or effects, by any person whatever.”

“At this period one of the objects to be attained, was not simply permission to carry on trade, but protection from the Turkish corsairs and pirates of that country, and that not merely confined to English merchants, but extended to all those who should accept the guarantee of the English flag.

“Let us look to another part of the Treaty. The fifteenth article says: “all Englishmen and subjects of England, who shall dwell or reside in our dominions, whether they be married or single, artizan or merchants, shall be exempt from all tribute.” These words “dwell or reside,” clearly contemplate not a temporary but a permanent residence. I think also that the reference to “married persons” indicates the same intention, for the residence of persons in that state is generally looked at as of a more permanent and fixed character than that of mere ordinary traders.

“Then it goes on to provide for the establishment of consuls [*534] in *the different ports, and “that any dispute between the English themselves shall be decided by their own ambassador or consul;” so

that the Treaty contemplates a residence under the protection of national consuls.

“‘Now I do not intend to go through the Treaty in detail: the sixteenth and eighteenth articles relate generally to the privileges granted to English subjects perfectly distinct from resident Turkish subjects. The twenty-sixth article provides: “that in case any Englishman or other person subject to that nation, or navigating under its flag, shall happen to die in our sacred dominions, our fiscal and other officers shall not upon pretence of its not being known to whom the property belongs, interpose any opposition or violence, by taking or seizing the effects that may be found at his death, but they shall be delivered up to such Englishman, whoever he may be, to whom the deceased may have left them by will.” This then, in my opinion, it is perfectly clear, must refer to a will made according to the law of England, for I am not aware of any power of testacy by the law of Turkey. The article goes on: “and if he shall have died intestate (this means intestate by the law of England) the property shall be delivered up to the English consul, or if there be no consul, in that case the property shall be sent over to England in the next ship.” Now this section alone goes the length of saying, not merely that the property of a person accidentally dying in the Turkish dominions shall be delivered up, but it contemplates the case of a person permanently resident there. The forty-sixth article contemplates the case of an Englishman permanently resident in Smyrna. “If any interpreter shall die, if he be an Englishman, proceeding from England, all his effects shall be taken possession of by the ambassador or consul; but if he be a subject of our dominions, they shall be delivered up to his next heir.” The forty-ninth article speaks of “merchants of the aforesaid nation.” The sixty-first article is to this effect: “If any Englishman shall turn Turk, and it shall be represented and proved that, besides his own goods, he has in his hands any property belonging to another person in England, such property shall be taken from him, and delivered up to the ambassador or consul, that they may convey the same to the owner thereof.”

“‘What is the effect of this article? If an Englishman turns a Turk, his property will be governed by the law of Turkey; but if he has in his hands the property of any Englishman, that will be regulated by the law of England. So that the case of an Englishman becoming a Turk, and so becoming subject to the law of Turkey, is contemplated, and “*expressio unius est exclusio alterius*.”

“‘The ninth article of the latter Treaty provides, that English consuls shall not be named from among the subjects of the Porte. *Generally speaking, a consul does not acquire a domicile by residence; *but* here a distinction is made between British subjects resident at [535] Smyrna, and those who are not British subjects.

“‘If, then, the Treaty be applicable to British merchants resident or domiciled, in the ordinary acceptance of the term, in Smyrna, the provisions of the Treaty decide what is to be done in the case of succession to personal estate, namely, that it is to follow the law of England.

“‘As to the case of *Moore v. Budd*,(e) I consider that my opinion does

not militate against that case, or the construction of the Treaty with Spain. This Court was of opinion that the will there propounded was invalid by the law of Spain, and, though more doubtfully, by the law of England. It held that the deceased was domiciled in Spain, never mentioning the Treaty. Indeed, not even in the argument was the Treaty alluded to, —no allegation on that point was given in,—no answers were taken; the King's Advocate of the day declined to argue the point, and not a single word appears in that case upon the construction of the Treaty. In my opinion, then, the effect of the Treaties is, that the law of Great Britain will operate on property left by a British merchant in the situation of the deceased; and I am not aware of any distinction even in the case of an individual having ceased to carry on trade.

“‘However, I do not wish to conclude myself on this latter point. I think the facts of the case, in this respect are meagre; but, in the absence of proof to the contrary, the conclusion I must draw is, that such is the law of England, as contradistinguished from the law of Scotland; but I must take care that I do not confuse the case on this point. I consider the deceased was domiciled in England, and not in Scotland, or in a colony; for great difficulty would have arisen had the deceased been domiciled in Scotland, and a new question, if he had been domiciled in British Guiana. I take the deceased to be domiciled in England. The will last made is a nullity,—it is not properly executed; the will of 1834 must, therefore, receive probate; that will was valid by the law at the time when it was executed, and nothing that has since passed has had the effect of revoking it.

“‘I wish to observe, that I am desirous not to be supposed to have given an opinion upon any question not necessary to be decided in this case; my judgment, therefore, does not affect the question of domicile, if the deceased was, in the legal sense, domiciled in Turkey; and if the law of domicile does prevail, the law of Turkey, in conformity with the Treaty, says, that in such case the succession to personal estate shall be governed by the British law: if he was not domiciled in Turkey, but in England, then the law of England prevails, *proprio vigore*.

[*536] “‘I give no opinion, therefore, whether a British subject can or *cannot acquire a Turkish domicile; but this I must say,—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte. As to British subjects, originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord Stowell has said does apply in cases of a total and entire difference of religion, customs, and habits.

“‘I pronounce in favour of this will, costs out of the estate.’”

No. 8.

STATUTES RELATING TO THE RUSSO-DUTCH LOAN.

An Act to carry into effect a Convention made between His Majesty and the King of the Netherlands and the Emperor of all the Russias. (f)
[28th June, 1815.]

WHEREAS by a Convention signed at London on the 19th day of May, 1815, between His Majesty on the one part, and the King of the Netherlands and the Emperor of all the Russias respectively on the other, the following articles, among others, were agreed upon; that is to say, His Majesty the King of the Netherlands thereby engaged to take upon himself a part of the capital, and arrears of interest to the 1st of January, 1816, of the Russian loan made in Holland through the intervention of the House of Hope and Company, in Amsterdam, to the amount of the twenty-five millions of florins Dutch currency; the annual interest of which sum, together with an annual payment for the liquidation of the same as thereafter specified, should be borne by and become a charge upon the kingdom of the Netherlands; and His Majesty engaged on his part to recommend to his Parliament to enable him to take upon himself an equal capital of the said Russian loan, *videlicet*, twenty-five millions of florins Dutch currency; the annual interest of which sum, together with an annual payment for the liquidation of the same, as thereafter specified, should be borne by and become a charge upon the Government of His Majesty; and the future charge to which his said Belgic Majesty and His Majesty should be respectively liable in equal shares on account of the said debt, was to consist of an annual interest of five per centum on the said capitals, each of twenty-five millions, together with a sinking fund of one per centum for the extinction of the same, the said sinking fund being subject however to be increased, on the demand of the Russian Government, to any annual sum not exceeding three per centum, the same to be payable till the capital of the *said debt should be fully discharged, when the aforesaid charge for interest and sink- [*537] ing fund should wholly cease to be borne by his said Belgic Majesty and His Majesty respectively; and His said Belgic Majesty and His Majesty respectively bound themselves, on or before the usual day or days in each year on which the interest on the said debt should be due and payable, to deposit with the agent of the Russian Government in Holland, their respective proportions of the said interest and sinking fund, as above specified: Provided always, that previously to the advance of each successive instalment so to be paid, the said agent shall be authorized to furnish a certificate to each of the said two high contracting parties, declaring that the preceding instalment had been duly applied in discharge of the interest, and in reduction of the principal of the said debt, together with the corresponding payments on account of the Russian Government on that part of the debt which should remain a charge on the said Government; and it was further agreed, that the Russian Government should

continue as heretofore to be security to the creditors for the whole of the said loan, and should be charged with the administration of the same; the Governments of the King of the Netherlands, and of His Britannic Majesty, remaining liable and bound to the Government of His Imperial Majesty, and for the punctual discharge as above of their respective proportions of the said charge; and it was thereby understood and agreed between the high contracting parties, that the said payments on the part of the King of the Netherlands, and of His Majesty as aforesaid, should cease and determine, should the possession and sovereignty (which God forbid) of the Belgic Provinces at any time pass or be severed from the dominions of His Majesty the King of the Netherlands, previous to the complete liquidation of the same; and it was also understood and agreed between the high contracting parties, that the payments on the part of the King of the Netherlands, and of His Majesty as aforesaid, should not be interrupted in the event (which God forbid) of a war breaking out between any of the three high contracting parties; the Government of His Majesty the Emperor of all the Russias being actually bound to its creditors by a similar agreement: And whereas the Commons of the United Kingdom have resolved that provision be made for enabling His Majesty to defray the expenses which may be incurred in the execution of the said Convention: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the Lord High Treasurer or the Commissioners of the Treasury of Great Britain, or any three or more of them, for the time being respectively, shall be and he and they is and are hereby empowered from time to time, out of the Consolidated Fund of Great Britain, to [538] cause to be issued such *sums of money as shall be required for the payment of the interest on such part of the capital of the said Russian loan as is agreed to be borne by His Majesty as aforesaid, and also for the payment of a sinking fund of one pound per centum, or not exceeding three pounds per centum, as the case may be, on the said part of the said capital, for the extinction of the same, as and when the same may from time to time respectively become payable, and so long as the same should be payable conformably to the tenor of His Majesty's engagements, as specified in the said Conventions respectively, and also such sums as may be required to pay and satisfy all the expenses attending the execution of this Act.

II. And be it further enacted, that the said Lord High Treasurer or Commissioners of the Treasury for the time being, shall cause to be prepared, and shall lay before both Houses of Parliament, within twenty days after the commencement of every session, an account up to the thirty-first day of December then next preceding, of the total sums which shall from time to time have been issued and applied by virtue of this Act for paying and satisfying the interest on the said part of the said loan so agreed to be borne by His said Majesty, on all or any of the said securities, and towards paying and satisfying the principal thereof (in case the principal of any of the said securities shall then have been paid)

and also for paying the expenses of carrying this Act into execution and the sinking fund for the extinction of the same; and such account shall also specify how much of the said part of the said loan has been discharged and how much remains to be discharged.

III. And be it further enacted, that it shall be lawful for the said Lord High Treasurer or the Commissioners of the Treasury, or any three or more of them for the time being, to appoint such officers and clerks as they may deem necessary for carrying this Act into execution; and to grant such salaries and compensations to the said officers and clerks, for their trouble and labour therein, as they may think fit and reasonable in that behalf.

IV. And be it further enacted, that this Act may be altered, varied, or repealed, by any Act to be passed in this Session of Parliament.

An Act to enable His Majesty to carry into effect a Convention made between His said Majesty and the Emperor of all the Russias.(g)

[3d August, 1832.]

WHEREAS by a Convention made and signed at London on the 16th day of November, in the year 1831, between His Majesty and [*539] *the Emperor of all the Russias, His said Majesty and the said Emperor of all the Russias, considering that the events which had occurred in the United Kingdom of the Netherlands since the year 1830, had rendered it necessary that the Courts of Great Britain and Russia should examine the stipulations of their Convention of the 19th day of May, 1815, as well as of the additional article annexed thereto, considering that such examination had led the two high contracting parties to the conclusion that complete agreement did not exist between the letter and spirit of that Convention, when regarded in connection with the circumstances which had attended the separation that had taken place between the two principal divisions of the United Kingdom of the Netherlands, but, that, on referring to the object of the above-mentioned Convention of the 19th day of May, 1815, it appeared that that object was to afford to Great Britain a guarantee that Russia would on all questions concerning Belgium identify her policy with that which the Court of London had deemed the best adapted for the maintenance of a just balance of power in Europe, and on the other hand to secure to Russia the payment of a portion of her old Dutch debt, in consideration of the general arrangements of the Congress of Vienna, to which she had given her adhesion, arrangements which remained in full force, their said Majesties, being desirous that the same principles should continue to govern their relations to each other, and that the special tie which the Convention of the 19th day of May, 1815, had formed between the two Courts should be maintained, agreed upon and concluded the following articles, among others; that is to say,

Article I.—In virtue of the considerations above specified, His Britan-

nic Majesty engages to recommend to his Parliament to enable him to undertake to continue on his part the payments stipulated in the Convention of the 19th day of May, 1815, according to the mode and until the completion of the sum fixed for Great Britain in the said Convention :

Article II.—In virtue of the same considerations, His Majesty the Emperor of all the Russias engages that if (which God forbid) the arrangements agreed upon for the independence and the neutrality of Belgium, and to the maintenance of which the two high Powers are equally bound, should be endangered by the course of events, he will not contract any other engagement without a previous agreement with His Britannic Majesty, and his formal assent :

And whereas the said Convention has been ratified, and the ratifications thereof were exchanged on the 21st day of June last : And whereas by the stipulations of the said Convention of the 19th day of May, in the year 1815, between His Majesty the King of the Netherlands and His late Majesty the Emperor of all the Russias, to which His late Majesty King George III. agreed to be a party, mentioned in the said recited Convention of the 16th day of November, *1831, His Majesty the King [*540] of the Netherlands, by the first article thereof, engaged to take upon himself a part of the capital and arrears of interest to the 1st day of January, 1816, of the Russian loan made in Holland through the intervention of the House of Hope and Company in Amsterdam, to the amount of twenty-five millions of florins Dutch currency, the annual interest of which sum, together with an annual payment for the liquidation of the same, as thereafter specified, should be borne by and become a charge upon the kingdom of the Netherlands ; and His Majesty the King of the United Kingdom of Great Britain and Ireland engaged on his part to recommend to his Parliament to enable him to take upon himself an equal capital of the said Russian loan, *videlicet*, twenty-five millions of florins Dutch currency, the annual interest of which sum, together with an annual payment for the liquidation of the same, as thereafter specified, should be borne by and become a charge upon the Government of His Britannic Majesty : And by the second article it was provided that the future charge to which their said Belgic and Britannic Majesties should be respectively liable in equal shares, on account of the said debt, was to consist of an annual interest of five per centum on the said capitals, each of twenty-five millions of florins, together with a sinking fund of one per centum for the extinction of the same, the said sinking fund being subject however to be increased, on the demand of the Russian Government, to any annual sum not exceeding three per centum, the same to be payable till the capital of the said debt should be fully discharged, when the aforesaid charge for interest and sinking fund should wholly cease to be borne by their said Belgic and Britannic Majesties respectively : And by the third article their said Belgic and Britannic Majesties respectively bound themselves, on or before the usual day or days in each year on which the interest on the said debt should be due and payable, to deposit with the agent of the Russian Government in Holland their respective proportions of the said interest and sinking fund as above speci-

fied : Provided always, that previously to the advance of each successive instalment so to be paid the said agent should be authorized to furnish a certificate to each of the said two high contracting parties, declaring that the preceeding instalment had been duly applied in discharge of the interest and in reduction of the principal of the said debt, together with the corresponding payments on account of the Russian Government on that part of the debt which should remain a charge on the said Government : And by the fourth article it was provided that the Russian Government should continue as theretofore to be security to the creditors for the whole of the said loan, and should be charged with the administration of the same, the Governments of the King of the Netherlands and of His Britannic Majesty remaining liable and bound to the Government of His Imperial Majesty each for the punctual discharge as above of the respective proportions *of the said charge : And by the fifth article it was thereby understood and agreed between the high contracting [*541] parties, that the said payments on the part of their Majesties the King of the Netherlands and the King of Great Britain as aforesaid should cease and determine should the possession and sovereignty (which God forbid) of the Belgic Provinces at any time pass or be severed from the dominions of His Majesty the King of the Netherlands previous to the complete liquidation of the same ; and it was also understood and agreed between the high contracting parties, that the payments on the part of their Majesties the King of the Netherlands and the King of Great Britain as aforesaid should not be interrupted in the event (which God forbid) of a war breaking out between any of the three high contracting parties, the Government of His Majesty the Emperor of all the Russias being actually bound to its creditors by a similar agreement : And whereas an Act passed in the fifty-fifth year of the reign of His late Majesty King George III. for carrying into effect the said last-mentioned Convention : And whereas it is expedient that His Majesty should be enabled to carry into effect the said Convention of the 16th day of November, 1831 : be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for His Majesty, his heirs and successors, and they are hereby authorized, considering the circumstances of the separation between the two principal divisions of the United Kingdom of the Netherlands, to continue the payments stipulated in the said Convention of the 19th day of May, 1815, according to the mode and until the completion of the sum fixed for Great Britain in the said last-mentioned Convention, and to complete and carry into effect in all other respects the stipulations of the said last-mentioned Convention, and of the said Convention of the 16th day of November, 1831 ; and all the powers given by the said recited Act to the Lord High Treasurer, or Commissioners of the Treasury or any three or more of them, for enabling His Majesty to make the payments required, and to defray the expenses which might be incurred in the execution of the said Convention of the 19th day of May, 1815, and all the enactments in the said Act contained, shall be and continue in force, and shall be extended and applied to the completion and carrying into

effect the stipulations of the said Convention of the 19th day of May, 1815, and of the said Convention of the 16th day of November, 1831.

[*542] *APPENDIX IV. (PAGES 117—133. CHAP. 8.)

RIGHTS OF SOVEREIGNS—CASES RELATING TO.

No. 1.

The columbian government v. Rothschild.(h)

THE bill commenced as follows :—

“ ‘Complaining, show unto your Lordship, the Government of the State of Columbia, and his Excellency Don Manuel José Hurtado, a citizen of the said State, and Minister Plenipotentiary from the same to the Court of His Britannic Majesty, now residing at No. 33, Baker Street, Portman Square, in the parish of Mary-le-Bone, in the County of Middlesex.’ It stated that the Senate and House of Representatives of the State of Columbia, having on the 30th June, 1823, decreed that a loan to the extent of thirty millions of hard dollars, being about 7,500,000*l.* sterling, should be raised upon the credit, and for the service of that State, Manuel Antonia Arrubla and Francisco Montoya, citizens of that State, were, under the decree, appointed Commissioners of the State for raising the loan, with the most ample powers and authorities to negotiate and contract for it on such terms as might seem to them most advantageous to the State, and to pledge, for the redemption of the principal and payment of the interest, the branches of the revenue of that State, appropriated for that purpose by the decree : that the Commissioners, in pursuance of the powers and authorities so given to them, in April, 1824, entered into a negotiation with Lyon Abraham Goldschmidt, since deceased, and Maurice Jacob Hertz, then carrying on business under the firm of B. A. Goldschmidt & Co., for raising a loan of 4,750,000*l.* sterling, on the credit and for the service of the State of Columbia, and that Messrs. Lyon Abraham Goldschmidt and Maurice Jacob Hertz, having agreed to be employed in raising it, a memorandum of agreement, dated the 14th of April, 1824, was executed, by or on behalf of Arrubla and Montoya, of the one part, and Messrs. Goldschmidt & Co. of the other part; and that in pursuance of a stipulation, contained in that memorandum, a complete agreement in writing, dated the 15th of May, 1824, and made between Arrubla and Montoya, on behalf of the Government of Columbia, of the one part, and Messrs. B. A. Goldschmidt & Co., of the other part, was prepared *and

[*543] executed, and thereby Arrubla and Montoya, engaged on the part of the Government of Columbia, to grant a general mortgage-bond for 4,750,000*l.* sterling, and to deliver to Goldschmidt & Co., in a pro-

(h) 1 Symons's Reports, p. 94. (Nov. 1826.)

per state for circulation, 23,150 certificates, which were to be signed by the plaintiff Hurtado; that the mortgage-bond should be considered as an absolute, inviolable, and indestructible pledge, mortgage, and security on all the revenues of the State of Columbia, present and future: that all moneys, the proceeds of the loan, should be placed at the disposal of Hurtado, and that his receipts should be a full discharge to Goldschmidt & Co.; and all arrangements which Goldschmidt & Co. might make with him respecting the execution of the Agreement, or any other matters or things proceeding from, or connected with the loan, were thereby approved of by Arrubla and Montoya, in the name and on the behalf of the State; and Arrubla and Montoya did thereby, as agents of the State, and by virtue of the decree and of the powers and authorities vested in them, bind the State of Columbia, and all the public authorities thereof, which did then or might thereafter exist, or perform faithfully and truly all the therein foregoing engagements and conditions.

“The bill then stated that the Senate and House of Representatives of Columbia, by a decree dated the 1st of May, 1825, ratified this agreement, and that it was immediately after its execution carried into effect; that Hurtado advanced and paid to Goldschmidt & Co., on the account and to the credit of the Government of Columbia, 57,000*l.* sterling, on the 1st of May, 1824, 41,000*l.* sterling in June, 1824, and 20,927*l.* 2*s.* 5*d.* on the 29th July, 1825; and that Goldschmidt & Co. did, at divers times, during the years 1824 and 1825, on the application and under the sanction of Hurtado, as the representative of the State of Columbia, purchase and ship for the use, and on the account and at the risk of the Government of that State, considerable quantities of shot, muskets, gunpowder and other military stores, and also of doubloons, dollars, gold bullion, silver bullion and other treasure, all which stores and treasure were consigned to the agent for the time being of that State at Carthage, or elsewhere in South America; and, on occasion of such shipments being made, the bills of lading and invoices of the articles so shipped were handed to Hurtado, by Goldschmidt & Co., who placed the costs of these articles, and the amount of the charges of purchasing and shipping the same, to the debit of the Government of Columbia, against the proceeds of the loan, and that Goldschmidt & Co. did also, on the credit of the coming proceeds of the loan, from time to time pay drafts or bills of exchange drawn, by the Minister of Finance of the State of Columbia, on Hurtado, and which were by him made payable at the house of Goldschmidt & Co. and debited the Government of Columbia with the amount *of the payments; and that they also, during and since [544] the year 1825, from time to time, in compliance with the stipulations in the agreement of the 15th of May, 1824, and by the directions of Hurtado, purchase up a considerable number of the certificates issued in respect of the loan, for the sinking fund of the loan, and, with the amount of the purchase-money paid by them for these certificates, and of the costs of brokerage for the purchase thereof, they debited the Government of Columbia against the proceeds of the loan: and, that, by these dealings and transactions between B. A. Goldschmidt & Co.,

and the Government of Columbia, there subsisted an account between them which had never been settled.

“The bill prayed that an account might be taken of all sums received by Goldschmidt & Co. for or on account of the Government of Columbia, and of all sums paid and expended by them, unto, or for the use of the Government; and that what, on the balance of such accounts, should appear to be due and owing from the firm, might be paid to Hurtado, as the representative of the Columbian Government.

“To this bill the defendants demurred for want of equity.

“The Attorney-General and Mr. Pemberton for the demurrer :—

“‘No persons appear before the Court in a character which enables them to sustain this bill. The plaintiffs are described as the Government of the State of Columbia, and Don Manuel José Hurtado joins as a citizen of that State.

“‘There is no mutuality in this case. For suppose it were necessary for the defendants to file a cross-bill, how are the plaintiffs in this bill to be described when made defendants? How is a subpoena to issue against them? Would it be sufficient to have a subpoena against Don José Hurtado? Certainly not, for it has been decided that an ambassador does not represent his Government in a Court of Justice. So far, therefore, as relates to what is called the State of Columbia, Hurtado has no right to sue, nor can he be sued. Even if it were admitted that a foreign State can sue in equity, surely there must be some mode of enforcing a cross equity against it. It is, however, doubtful whether a foreign State can sue in a Court of Equity. From the books it appears that the King of Spain has been allowed to bring an action at law. But the remedies and the forms of process in a Court of Equity, make it much more difficult to show how a foreign state can maintain a suit to enforce an equitable demand. At law there are no cross equities or cross-claims. But where an account is to be taken, or an agreement to be performed and enforced by the process of a Court of Equity, it is not easy to see how it can be done. Suppose, on taking an account at the suit of a foreign State, the balance is found to be against the plaintiffs, in what manner can the payment of that balance be enforced?

[*545] In the case of the *Nabob of the Carnatic v. The *East India Company*,⁽ⁱ⁾ an anecdote is mentioned of the King of Spain being, by the advice of Selden, outlawed to prevent his bringing an action. But how could the State of Columbia be outlawed? If a Court of Equity is to entertain a suit at all, it must see that it can enforce justice, as well on behalf of the defendant as of the plaintiff. This bill, indeed, charges that Hurtado, the co-plaintiff, has been the agent of the State, and is the proper person to receive what is claimed to be due to the State. But that, instead of reason why he should be a plaintiff in such a bill, is a sufficient reason why he should not. Nor indeed does he submit by the bill, as every accounting party ought to do, to pay the balance if any should be found due from him on taking the account. It is, however of great importance to observe that, in 1824, at the time

(i) 1 Vesey, Jr. 371. See 386 n. S. C. 3 Bro. C. C. 292; 4 Bro. C. C. 180; and 2 Vesey, Jr. 56.

when the transaction took place, in respect of which relief is sought by the bill, there was no such State in existence—no body of persons who had any right, in this country, to assume to themselves the title which is now assumed by the plaintiffs in this bill. It was not till 1825, that the State of Columbia was recognized by the Government of this country.

“Another question, therefore, arises upon this bill, whether it is competent to the subjects of this country to treat with a foreign Government not recognized by the Government of this country? That question came before the Lord Chancellor in the case of the Peruvian Loan, *Jones v. Del Rio*. In that case it appeared that the Peruvian Government, which is recognized by this country, contracted with Mr. Kinder for raising a loan, to be secured on the revenue of that Government. Some of the parties who advanced money on that loan became greatly dissatisfied with the transaction, and a bill was therefore filed against Kinder, Everett, and other persons concerned in it. On an application to the Court, after that bill was filed, the Lord Chancellor suggested the objection as to how he could recognize such a transaction, with a Government not recognized by this country; and whether transactions of such a nature might not create an interest adverse to the public interest of the British nation. That objection was not very palatable to any of the parties concerned in the case; but the Lord Chancellor insisted on its being argued. In the course of the argument, the Lord Chancellor made many very strong observations, which showed an opinion that such transactions could not be recognized in a Court of Justice. The case was, however, ultimately decided on the ground that as the plaintiffs sued on behalf of themselves and others, though the plaintiffs wished to annul the contract which *was the subject of the suit, yet the other parties might not wish to do so; and on [*546] that ground his Lordship dissolved the injunction. In the present case, the subsequent recognition of the State of Columbia by the Government of this country, could have no effect as to the antecedent transaction which is now brought in question; for, although the Crown has the right to bind the country by Treaty with a foreign State, that Treaty does not affect the rights and claims of individuals, unless there be some express stipulation on the subject.

“Mr. Sugden, Mr. Pepys, and Mr. R. Grant for the bill:—

“1. Assuming that the State of Columbia was not recognized by the Government of this country at the time when the agreement was made, it cannot be disputed that, soon afterwards, and before the bill was filed, it was solemnly recognized by the British Government. On the 18th of April, 1825, that recognition took place, and from that time forward the State of Columbia became invested with all the rights of other independent States, and, as such, can sue and be sued in this country. By a Decree of the State of Columbia, made after the recognition by this country, that State has acceded to the agreement which is the subject of this bill.

“2. As to the right of a sovereign State to sue in this country, there can be no doubt what the usage has been in this respect. There

are many bills now on the files of this Court, in which the King of Spain is plaintiff. In a recent case the King of Spain v. Mendizabel, the Lord Chancellor made an order restraining the defendant from bringing an action at law; but it did not occur to any one that it was possible to prevent the plaintiff from having relief in the character of a Sovereign Prince. There is no authority against it. This case is not to be put on what, or how many, the individuals are, who constituted the Government of Columbia. Any Sovereign or State which is known and recognized by a general appellation, may sue, as such, under that appellation. No man can deny that at the date of the agreement, the State of Columbia, though not recognized by this country, was in existence, and therefore it was capable, by the law of nations, of being a party to a contract. It might be capable of contracting, and yet be unable to enforce the contract in a particular country, on account of particular reasons. But is the recognition of the State by this country to affect the validity of a contract? Certainly not; because that recognition is a matter merely of political expediency, depending on reasons purely political. What the Lord Chancellor is stated to have said, in the case of *Jones v. Del Rio*, must be considered as spoken by his Lordship in his character of a statesman merely; and it is impossible not to see that many transactions tending to embroil this country with a foreign Power, may be liable to great objection in the view of a statesman, without being at all questionable in a *Court of Justice. [*547] The validity of a contract as a contract, does not depend on the law of any particular State, but on there being parties capable of contracting. Where the contract is valid, the contracting parties must be able to enforce it in a Court of Justice. Every writer on the law of nations has laid it down that a sovereign independent State is competent to enter into a valid contract. Vattel describes it as one of the attributes of a State.^(k) But this demurrer assumes the existence of the Government of Columbia as described in the bill; the objection therefore ought to be by a plea.

“3. Don M. J. Hurtado, who joins as a plaintiff in this suit, states himself to be a citizen and Plenipotentiary of the State of Columbia; and also describes himself as an individual residing in a particular street in London. He is so described also in the agreement, and that description gives him, as an individual, all the powers necessary to enable him to maintain this suit alone. There can be no doubt that he, at least, has full authority to file this bill. The moneys in question never found their way directly to the State of Columbia, but to Hurtado; and, on the faith of the agreement, he has paid large sums of money to the defendants. Therefore, if the Court should be of opinion that the Government of Columbia, as a Government, cannot sue in this case, still there is before the Court a plaintiff entitled to sue on the rights which he has acquired under the contract.

“4. As to the objection that the bill, being for an account, does not contain any offer to pay the balance if found against the plaintiff, such

(k) Lib. i. cap. 1, s. 4.

an offer is not now considered necessary. The mere filing a bill for an account enables the Court to do all justice between the parties.'

"(The Vice-Chancellor said that the Court had originally required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance if found against him; but that was not now considered necessary.)

"Mr. Hart, Mr. Horne, and Mr. Collinson, appeared for other defendants, but were not called upon to argue the case.

"The Vice-Chancellor:—

"It does not appear to me to be necessary to notice the several objections which have been made to this bill.(l)

"A foreign State is as well entitled as any individual to the aid of this Court in the assertion of its rights; but it must sue in a form which makes it possible for this Court to do justice to the defendants. It must sue in the names of some public officers who *are entitled [*548] to represent the interests of the State, and upon whom process can be served on the part of the defendants and who can be called upon to answer the cross-bill of the defendants. This general description of "The Columbian Government," precludes the defendants from these just rights; and no instance can be stated in which this Court has entertained the suit of a foreign State by such a description.'

"Demurrer allowed."

No. 2.

HULLET AND CO. (*App.*) V. KING OF SPAIN (*Resp.*)(m)

"Machado, as agent for the King of Spain, receives from the French Government a sum of money, which that Government had agreed to pay to the King of Spain, in satisfaction of the claims of certain Spanish subjects on France. Machado brings the money to this country, and deposits a considerable portion of it in the hands of Hullet & Co. of London. The King of Spain applies to Machado for the money, and Machado refuses to deliver it on the pretence that he is bound to pay only to such subjects of Spain as should be found ultimately entitled to it. Bill in the name of the King of Spain against Machado (out of the jurisdiction,) and against Hullet & Co., for discovery and payment of the money into Court. Demurrer to the bill for want of parties, &c., but chiefly on the ground that it had never been held that a foreign Sovereign could sue in equity in this country, Order by the Court below, overruling the demurrer, affirmed by the Lords.

"A foreign Sovereign has a right to sue in this country in equity as well as at law. In this case the King of Spain is the only party entitled to the money in the first instance."

"THE bill filed 22nd December, 1827, stated the Treaties of 30th May, 1814, 20th November, 1815, and 25th April, 1818, for the adjustment of the claims upon France of the several Powers who had been engaged in the French revolutionary war; and also separate Con-

(l) These objections were, that the agreement was usurious; and that as no relief was prayed against the defendant Rothschild, the demurrer was, at all events, good as to him.

(m) 1 Dow & Clark's Reports, 169-177.

ventions of the 18th March, 1818, and 30th April, 1822, between the French and Spanish Governments, who had mutual claims on each other for the adjustment of these claims; and the French Government agreed to pay the balance to such person as the Spanish Government should appoint to receive it. Don Justo José de Machado was appointed for that purpose, and his name was inscribed in the book of the public debt of France for a sum amounting to about 500,000*l.* in British money.

"When the Spanish constitutional war broke out in 1823, Machado sold out of the French funds, and brought the money to England. Bills, signed by Ferdinand, were drawn by the Constitutional Government of Spain on Machado in respect of this money, which he refused to pay, and protested, alleging as his reason, that he held the fund for such of the subjects of Spain as should be found entitled to it, when the claims should be duly investigated and ascertained. After the cessation of the war, the Spanish Government, by decree, dated 21st March, 1824, appointed boards for ascertaining and adjusting the claims on the fund, and securing its proper application and distribution; and communicated this decree to Machado, with much commendation from His Majesty for [*549] his refusal to pay the money *to the order of the Constitutional Government. The presidents of the boards directed Machado to deposit the fund in the Bank of England in their name; but this Machado refused to do, stating that he was ready to pay the persons entitled when the boards should have settled their claims.

"The bill then stated, that in December, 1824, Machado deposited about 200,000*l.* of this money with Hullet, Brothers, & Co., in the name of his secretary, Achilles de Pereira, who, as the defendants well knew, had no interest whatever in it, and whose name was employed merely to prevent any attachment of the money by persons having claims on the Spanish Government; and the bill charged that both Machado and Pereira were residing in the Netherlands, out of the jurisdiction of the Court of Chancery, and that the defendants, Hullet & Co., after settling accounts with Machado, still retained about 100,000*l.* of this money, which belonged to the plaintiff, as head of the Spanish Government; and the bill prayed, 'that Hullet & Co., and the said Don Justo José de Machado, when he came within the jurisdiction of the said Court of Chancery, might answer the matters of the said bill; and that an account might be taken by and under the direction and decree of the said Court of Chancery, of all and singular the sums of money which had been paid to or deposited with Hullet & Co. by the said defendant Don Justo José de Machado, in the manner thereinbefore in that behalf stated, and of the funds brought over by him to this country, as thereinbefore mentioned; and that the amount thereof might be ascertained, and paid over by Hullet & Co. to the plaintiff, or his agents in that behalf lawfully authorised to receive the same; or otherwise, that Hullet & Co. might be ordered forthwith to pay the same into the Bank of England, with the privity of the Accountant-General of the said Court of Chancery, in trust in the said cause; and that the said defendant Don Justo José de Machado might in the meantime be restrained, by the order and injunction of the said Court of Chancery, from commencing or prosecuting any action or

suit-at-law, or taking any steps whatsoever against Hullet & Co., for the purpose thereby of obtaining re-payment of the moneys so paid to or deposited with them, Hullet & Co., as aforesaid; and that Hullet & Co. might also in like manner be restrained from paying over the moneys last mentioned to the said Don Justo José de Machado, or parting with the same, without the direction of the said Court of Chancery in that behalf; and that Hullet & Co. might set forth the claims (if any) which they had, or claimed to be entitled to, upon the said moneys so paid to or deposited with them as aforesaid, or upon the said funds so received by the said Don Justo José de Machado by virtue of the said Convention of the 30th day of April, 1822, as aforesaid, and the particulars thereof, and how they make out the same, and that the said claims might be disposed of *by the said Court of Chancery;’ and the bill prayed process [*550] against Hullet & Co., and against Machado, when he should come within the jurisdiction.

“Machado did not appear, but Hullet & Co. appeared to the said bill, and on the 31st day of January last filed a demurrer thereto, and they thereby for cause of demurrer showed that the respondent had not by his said bill made such a case as entitled him in a Court of Equity to any relief against them, or either of them; and for further cause of demurrer, they thereby showed, that the plaintiff had not made the said Achilles de Pereira a party thereto, nor prayed process against him; neither had the plaintiff made parties to the said bill, nor prayed process against any or all of the persons who, according to the statements in the said bill, had or were entitled to claim a beneficial interest in the moneys in the said bill mentioned, or any part thereof.

“The demurrer came on to be argued on the 22nd day of March, 1828, before the Lord Chancellor, by whom it was overruled; and against this order the defendants, Hullet & Co., appealed to the House of Lords:—

“1st, Because it has never been held that a foreign Sovereign can sue in courts of equity in England; and according to the principles of such Courts, such a plaintiff ought not to be allowed to sue therein, inasmuch as by no possibility can process be issued with effect, or equity done, or a decree enforced against him.

“2dly, Because the pretended rights on which the plaintiff in this bill relies are rights which he claims merely by virtue of his prerogative as King of Spain; and it is not according to the law or constitution of England, that an English Court of Equity should be made instrumental in enforcing in England the prerogative of a foreign Sovereign.

“3dly, Because the pretended right of the King of Spain to the moneys sought to be recovered by the bill arises out of a Treaty with France, which was inconsistent with the existing relations between each of those countries and His Majesty the King of this country; and an English Court of Equity, therefore, will not lend its aid to enforce any such pretended right.

“4thly, Because this is a bill in equity, according to the statement of which, not one of the parties before the Court has any right to the

beneficial enjoyment of the property which is the subject of the suit, and no decree could be made upon it which would do complete justice.

“5thly, Because the bill does not bring before the Court all the parties interested in the matters of the suit, and in the questions raised by the statement in the bill, nor any persons who represent those parties or their interests; and particularly because Achilles de Pereira is not made a party to the suit, though the bill states that the moneys of which the plaintiff seeks to obtain possession, were paid to or deposited with these appellants in the name of the said Achilles de Pereira.’

[*551] *‘The cause came on for hearing on the 11th and 18th June, 1828; Pepys and Russel for the appellants, Wetherell (Attorney-General) and Horne for the respondent.

‘Lord Lyndhurst (Chancellor):—‘The French and Spanish Governments had mutual claims on each other, and they agreed to set the claims of the one against those of the other. What is there fraudulent in that?’

‘Lord Redesdale:—‘The French Government was the only one which had any pretence to say that the money should be paid only to the persons whose claims should be established.’

‘Lord Lyndhurst (Chancellor):—‘The money was to be paid to the person whom the king of Spain should nominate; he nominates Machado, who, as his nominee or agent, does receive it, and now he says he is not accountable to the King of Spain. Neither the boards of Commissioners nor the Spanish subjects had anything to do with it in the first instance. We cannot presume that the King of Spain will not distribute the money to those who have claims; we cannot enter into that question at all. Machado received the money under the authority of the King of Spain, and to him he is accountable. Suppose the King of Spain had sent jewels here to be set, and the jeweller refused to restore them, would the King of Spain have no remedy at law to recover them or their value? Why should he not have his remedy here as well as any other foreigner? When he sues here as a plaintiff the Court has complete control over him, and may hold him to all proper terms.’

‘Lord Redesdale:—‘When the King of Scotland was Earl of Huntingdon, could he not maintain his action here against his steward for the rents of that earldom? I am an executor of the Duchess of Brunswick; can I not maintain an action here in her name for what is due to her?’

‘Lord Lyndhurst (Chancellor): ‘It was decided that a foreign Sovereign might sue at law, and why not in equity? At all events, this was a bill of discovery, in which the Courts of Equity had a concurrent jurisdiction. As to parties, it must be admitted, because so stated in bill, that Achilles de Pereira had no interest, and neither the members of the boards, nor the parties who had claims, had anything to do with the funds in the first instance.’

“JUDGMENT.

‘Lord Redesdale:—‘I do not know whether your Lordships have any doubt as to this question, but I have none. I have no doubt but a foreign Sovereign may sue in this country, otherwise there would be a right

without a remedy. He sues here on behalf of his subjects, and if foreign Sovereigns were not allowed to do that, the refusal might be a cause of war. This was a transaction between the Governments of France and Spain, and Machado was the agent appointed by the King of Spain to receive *the money; and if any one had a right to object to pay the money to him in that capacity, or to any one except the parties [*552] who might be ultimately entitled, it was the King of France; but the French Government made no objection, but paid him the money, and he received it as an agent nominated for that purpose by the King of Spain. He deposits the money in the hands of the defendants, Messrs. Hullet & Co.; and one reason—a very slight reason indeed—for their refusal to bring it into Court, according to the prayer of the bill, was, that it had been deposited in the name of Achilles de Pereira, Machado's clerk, who was not made a party. But the defendants well knew that the name of Achilles de Pereira was employed for the purpose of the deposit by Machado, and that he had no interest in the money, and they even admitted that he had no interest in it, and acknowledged that the person to whom they were accountable was Machado. And who was this Machado?—the agent of the King of Spain, and the defendants knew that the money was that of the King of Spain. The defendants had nothing at all to do with these Treaties. They had the King of Spain's money deposited with them by his agent, and they were bound to answer.

“ ‘But supposing other parties had any interest in it, the prayer of the bill merely was, that the money should be paid into Court, and then others who thought they had claims might come and set them up; but that was no reason why the defendants should not make the requisite discovery, and pay the money. There is no ground for the notion that a foreign Sovereign cannot sue in the Courts of this country. It appears to me clear that he can sue, and it would be monstrous injustice if he could not. How otherwise could the King of Spain get the money out of their hands? What had they to do with the due distribution of the money? That was the business of the Sovereign to whom, in the first instance, the money belonged, and to the boards which he had appointed for the purpose. The defendants cannot honestly keep this money and refuse to answer, for they do pretend that it is their own money; and is it not the best and most honest course of proceeding to pay it into Court? If other persons have claims, it is their business to attend to them, and not that of the defendants. Yet I doubt very much whether the Court of Chancery can do more than transfer the money to the King of Spain, or to the boards appointed by him. The claims of the several parties can only be settled by their own Sovereign; and although he may be a trustee for others, it is not by the Court of Chancery here that he can be compelled to execute that trust. The Sovereign himself is the one who has to see to that. It is enough for the defendants that they have the money from Machado, and that he held it as the agent of the King of Spain. It is sufficiently set forth in the bill, that this Achilles de Pereira has no interest in it, and so it is admitted by the demurrer. I move, your Lordships, that the judgment of the Court below be affirmed.’ ”

*“Lord Lyndhurst (Chancellor):—‘I see no reason to alter [*553] the opinion which I gave on this question in the Court below.’

“Judgment affirmed.

“Sir C. Wetherell (Attorney-General):—‘Ought not the King of Spain to have his costs?’

“Lord Lyndhurst (Chancellor):—‘We will not disparage the dignity of the King of Spain by giving him costs.’”

No. 3.

THE KING OF SPAIN (*App.*) v. HULLET AND WIDDER (*Resp.*)(*n*)

“A foreign Sovereign Prince, being declared entitled to sue in the Court of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, or without oath or signature, to a cross-bill, filed against him by the defendants to his original bill. Held, that he stands on the same footing with ordinary suitors as to the rules and practice of the Court, and is bound like them, to answer a cross-bill personally and upon oath.

“The plaintiffs in the cross-bill having put in a full and sufficient answer to the original bill, which is subsequently amended, obtain an order for a month’s time to plead, answer, or demur to the amended bill, after the plaintiff therein should have answered their cross-bill; that order is held good, and is accordingly affirmed.”

“THE material allegations and prayer of the appellant’s original bill, are stated in the report of a former appeal (1 Dow and Clark, 169,) brought by the respondents against an order of the then Lord Chancellor, overruling their demurrer to that bill. The House of Lords dismissed that appeal, and affirmed the order of the Court below, on the 18th June, 1828, thereby establishing the appellant’s right to sue in our Courts of Equity, as a foreign Sovereign, and in his political capacity. The respondents, on the 3d of July following, filed their cross-bill in the Court of Chancery against the appellant and Don Justo de Machado, who had also been made defendant to the appellant’s bill, but remained out of the jurisdiction.

“The cross-bill, after reciting the material parts and the prayer of the original bill, stated, and charged in circumstantial detail, that many of the allegations in respect of which the respondents were made parties to the said original bill were not according to the truth, and that the appellant had in his power, and in the power of his agents, servants and ministers, various documents and statements, by which, if produced, it would appear that many of the allegations in said bill were not according to the truth, and by which also the truth of many other circumstances would appear, whereby it would be shown that appellant had no title to relief against these respondents in respect of any of the matters in said bill mentioned: That the appellant had no right to the fund provided by the Treaties in the said original bill mentioned; and that the claims of Spanish subjects on that fund had been adjudicated in Paris, and openly, and with the

(*n*) 1 Clark and Finnelly’s Reports of Cases in the House of Lords, 333. (Aug. 1833.)

knowledge of the appellant, sold, and by such sales became the property of French and British subjects: That His Catholic Majesty had unduly got possession of a considerable portion of the trust or indemnity fund, and misapplied it, and that he intended to apply to the *general purposes of his Government the money alleged in his bill to be [*554] deposited with the respondents; and that, as evidence of such intention, His Catholic Majesty and the assembly of the Cortes, in the year 1823, enacted that the said fund should be applied to the exigencies of the Executive Government; and the Spanish finance minister accordingly assigned the said fund to divers persons, by drawing bills of exchange against it, whereby any right assumed by the appellant and Government of Spain of further dealing with it, was wholly extinguished: That by the laws of Spain, the moneys in the said original bill mentioned did not belong to His Catholic Majesty, nor was he entitled to sue for the same; and that so it would appear, if His said Majesty would set forth the law of Spain by which he claimed to have any interest in the said moneys, or any right to sue for the same: That various despatches, communications, and orders had been transmitted by the orders and with the privity of His said Catholic Majesty to the said Justo de Machado, in which it was admitted, or stated, that His Catholic Majesty had no right, or interest, or title in or to any moneys in possession of the said Justo de Machado; and that so it would appear, if all communications or despatches made or sent to the said Justo de Machado, by, or by the orders of, or with the privity of His said Catholic Majesty, or any of his ministers or council, were set forth: That the said moneys, by certain agreements entered into by His Catholic Majesty, or with his authority, did, as against him, and all persons claiming under him, belong exclusively to certain persons having claims under a certain convention, concluded in May, 1823, by which His Catholic Majesty became bound to make full compensation to all British subjects for property or vessels belonging to them, which had been detained or seized by Spanish vessels or Spanish authorities, at any time after the 4th of July, 1808, down to the date of the said Convention; and, in particular, that a great part of the said moneys did belong to respondents, for that the Spanish Government seized, or caused to be seized, subsequently to the 4th July, 1808, two ships, called the Scorpion and the Vulture, with their cargoes, which belonged to these respondents; and that the same were sold by the authority of the King of Spain; and that the whole of the proceeds thereof, amounting to upwards of one million of Spanish dollars, were paid into the royal treasury, and applied to the use of His Catholic Majesty, and that these respondents had a good and valid claim against him to the amount of more than 200,000*l.*, which they were prevented from enforcing against him merely by his royal character.

“The cross-bill further charged, that there was a special necessity that the appellant should be compelled to answer upon oath, all the matters thereinbefore mentioned, inasmuch as the same were material to the respondents’ defence in the original suit, *and to produce all writings, [*555] papers, and documents in any way relating to any of the matters therein mentioned, which then were in the possession of him, or of any

of his agents, ministers or servants: That His Catholic Majesty had knowledge, remembrance or belief with respect to all or many of the matters thereinbefore mentioned, and had documents and writings, and other means of full and perfect knowledge as to the same, within his power; and that he was bound to use such means, in order to give the respondents the aforesaid discovery, and that, without the production of the said documents, and the discovery of all the matters by the said cross-bill enquired after, these respondents could not have justice in the said original suit, the more especially as His said Catholic Majesty intended to amend his said original bill, and materially to alter the case stated in it, which these respondents submitted he ought not to be allowed to do till he should have fully answered their said cross-bill; the discovery thereby prayed, being such as, besides being essential to their defence to the original bill, would show the untruth of the allegations which the appellant intended to introduce by amendment into his said original bill.

"The cross-bill then prayed, amongst other things, that the appellant might be ordered to make to these respondents the discovery thereby sought, and that His said Catholic Majesty might also be restrained from proceeding in the said original suit, until he should have granted a full discovery of all the matters of which a discovery was thereby prayed, and of all the writings, papers, and documents therein mentioned.

"The respondents, in the same month of July, 1828, put in their joint and several answer to the appellant's original bill. And the appellant having amended(o) his bill in March, 1830, an order was made in both causes by the Vice-Chancellor, bearing date the 8th day of May, 1830, upon the application of the respondents, that they should have a month's time to plead, answer or demur to the amended bill, after the appellant should have answered the bill of the respondents. An application, made on behalf of the appellant to the then Lord Chancellor to discharge that order, was refused on the 6th day of July following.

"The respondents were subsequently served with two notices of motions to be made on behalf of the appellant, before the present Lord Chancellor. One, bearing date 15th January, 1831, was to the effect, 'that Don Juan Escudero, residing in Weymouth-street, in the County of Middlesex, might be permitted, on behalf and in the name of the appellant, to put in an answer to the bill of the respondents, the appellant thereby undertaking that the answer so to be put in, and all proceedings consequent upon it, should be as valid and effectual for the purposes of the said [556] *causes, in such manner as the Court should direct, as if such answer had been put in personally by the appellant in the ordinary course; or that the said Court would be pleased, under the peculiar circumstances of the case, to accept the answer of the appellant without oath or signature.'

"An affidavit of Don Juan Escudero, filed in support of that intended motion, stated, amongst other things, that he was one of the appellant's subjects, and appointed by him a commissioner in this country, for the purpose of recovering from the respondents and others the indemnity

funds mentioned in the pleadings: That deponent had perused and carefully considered the said bill filed by the respondents, purporting to be a cross-bill, and believed that the appellant had personally little or no knowledge of the matters contained therein: That, believing it would be impossible to procure an answer to the said cross-bill from the appellant personally, inasmuch as deponent conceived it would be, and as he was instructed by authority, would be considered, both by the appellant and the Spanish Government, inconsistent with the rank and dignity of the appellant, as a Sovereign Prince, to put in an answer personally and upon oath in the said Court of Chancery, or in any of the Courts or tribunals of this or any other country, he, this deponent, upon advice of counsel, and after communication with the appellant, was authorized by him to put in, on behalf and in representation of the appellant, an answer to the said cross-bill, and also to consent, on the part of the appellant, that such answer, and all proceedings in the said causes consequent thereupon, should be as valid and effectual for the object and result of both the said suits as if the appellant himself had put in the answer in the ordinary way; and that from the knowledge deponent possessed as to the several matters contained in the said cross-bill, he had no doubt whatever but that he could give a full answer and discovery as to all the matters therein contained, if he were permitted so to do by the said Court of Chancery, and that he was willing if the said Court should think fit so to direct, to put in a full and complete answer to the said cross-bill, in the place and in the name of the appellant.

“The second notice of motion, bearing date the 10th September, 1831, was to the effect that the aforesaid order of the Vice-Chancellor, of the 8th day of May, 1830, affirmed, on appeal, by the Lord Chancellor, the 6th day of July, 1830, might, with the said order of the 6th day of July, be discharged.

“An affidavit of Mr. Thomas Browning, filed on the 15th day of November, 1831, in aid of both motions, stated, amongst other things, that deponent was the solicitor employed in the said causes on behalf of the appellant, and that on the 30th day of August, 1831, an order was made by the Court of Chancery in a cause still pending, in which Juan Alvarez y Mendizabel was complainant, and the said Machado, the respondents, the appellant, and *others were defendants, whereby these respondents were ordered to pay into the Bank of England, to the credit [*557] of that cause, the sum of 24,020*l.*, and to deposit certain mining shares, part of the indemnity fund, or of the produce thereof, alleged in the appellant's bill to have come into the respondent's hands under the circumstances therein stated. The deponent, after setting forth in his affidavit several communications between himself and the solicitors to the said Mendizabel, as to a proposed co-operation to enforce the last-mentioned order, stated that the bill of Mendizabel was dismissed, as against Messrs. Hullet and Widder, without previous intimation to deponent: that, in consequence of such dismissal, the said order of the 30th day of August had not been in any manner acted upon; and that deponent had good reason for believing that the said Mendizabel had been induced to dismiss his bill as against the respondents, either in consequence of some bribe

given or promised to him by the respondents for that purpose, or in consequence of some fraudulent concert, compromise, or agreement subsisting between the said Mendizabel and the respondents.

"The respondents excepted to this last affidavit for impertinence, and their exceptions being referred to the Master, he certified that the whole of that affidavit was impertinent. The Master's report was subsequently confirmed by two orders made by the Lord Chancellor, one bearing date the 15th of March, 1832, referring back to the Master, to expunge the said impertinence from the affidavit; the second bearing date on the 14th of May following, disallowing exceptions, filed by the appellant against the report.

"By another order of the same 14th of May, 1832, his Lordship having previously heard the two motions, of which the notices are above stated, was pleased to declare that he did not think fit to make any order upon them.

"The King of Spain now, by his appeal to this House, prayed for the reversal of all these orders, viz., the order of the Vice-Chancellor of the 8th of May, 1830, the order of the then Lord Chancellor of the 6th of July, 1830, affirming the same, and the said three orders of the present Lord Chancellor of the 15th of March, and 14th of May, 1832.

"The Attorney-General and Sir C. Wetherall, in support of the appeal: 'This is a case of first impression. This is the first time a foreign potentate has been called upon as a defendant to put in an answer upon oath. None of the Judges before whom this case came, none of the Counsel who argued it on either side in the Court below, or who argued it now here, have been able to find one precedent. The respondents have already questioned, by their demurrer, the right of the appellant to sue as a foreign Sovereign in our Court of Chancery. But your Lordships [*558] decided against them, and by that decision it is now established, *that a foreign Sovereign may sue on behalf of his subjects in our Courts, and is entitled to be considered as a Sovereign Prince to all intents and purposes; (p) the individual is merged in the Sovereign, and he cannot be called on to put in an answer upon oath as a natural person. By that decision upon the demurrer, it was declared that the King of Spain was entitled to an answer to his bill from these respondents. The respondents, baffled in their first manœuvre, next filed a cross-bill, before they put in an answer to the original bill, with the view that, knowing their answer would render it necessary for the original bill to be amended, they might have an answer to their cross-bill before they answered the amended bill. The order of the Vice-Chancellor, that now first appealed from, was what they anticipated; that order is wrong. For, in the first place, this is not a cross-bill, according to the definition of a cross-bill, as generally understood, or according to the real principle upon which alone a Court of Equity allows the right to file a cross-bill, namely, that the defendant to an original bill may have an answer on oath to his cross-bill, in order to enable him to make out a complete defence to the original bill. This House decided that the original bill was the bill of

the King of Spain as King. But the bill of the respondents is not against the King of Spain, but against "a certain individual claiming the appellation and title of His Catholic Majesty Ferdinand VII. residing at the palace of the Escorial, near Madrid," &c. A cross-bill should be filed against the same plaintiff who sued by the original bill.'

"Lord Wynford:—'Has he demurred to the cross-bill?'

"Lord Plunkett:—'The proper way to try that question would be by demurrer.'

"Counsel for the Appellant:—'We feel a difficulty on that point. We are now showing that this is not a cross-bill; but if your Lordships decide against us on that point, then our difficulties will be multiplied. There may be a good defence to a cross-bill, without demurring. If we demurred, we should thereby have admitted the allegations of facts in the cross-bill, which we do not admit, and therefore we could not demur, for there is no ground for the allegation therein made, that the King of Spain is misdealing with the indemnity funds. The practical purpose of a cross-bill is admitted by all the authorities on the subject to be for protecting a defendant from any unjust claim; and many cases may be put in which a defendant could not put in a complete answer to the original bill essential to his defence, until he had first obtained an answer to the cross-bill filed by himself. The respondents' bill is not for that purpose; we call their cross-bill a mockery: it charges that British subjects, and among them the *defendants, had claims on Spain for piratical attacks on the Scorpion and Vulture ships, in 1808. This is an imposi- [*559] tion on the Court of Chancery. Compensation has been already made for such claims by a Convention with Spain. If your Lordships decide this to be a cross-bill, we must submit; but we rely on this part of the case for the appellant, and entreat your Lordships to look at the whole of the record before you come to that decision, which may be of dangerous consequence, inasmuch as fraudulent parties may hereafter take advantage of the form. With respect to the rule of practice in the Court of Chancery, namely, that the identical plaintiff in the original bill must himself swear to his answer to a cross-bill, we maintain that that is not a universal nor an inflexible rule. The Court of Chancery dispenses with it in the cases of peers, corporations, infants, lunatics, married women, and other persons in the like situations, and these cases furnish an analogy important to be kept in view in the present case. Granting the existence of the rule, we say there is nothing in the generality of the practice, nor in the special nature of this case, to require the application of it here. Why is exception made in case of a peer? It is because he is a hereditary legislator, and it is part of our municipal policy to accept his word of honour instead of his oath. Will your Lordships require of the King of Spain, suing here on behalf of his subjects, to do that which you dispense with in a petty baron of twenty-four hours' creation, in a simple controversey with one of his fellow subjects? A peer can, and does take an oath in some cases; but the Court of Chancery dispenses with his oath in an answer to a cross-bill. Why cannot this House institute a like rule in the case of a King? In cross-bills against corporations, the town-clerk swears to the answer for them.'

“The Lord Chancellor :—‘Both Lord Redesdale and Lord Lyndhurst, in their judgment on the demurrer, said, that the King of Spain was on the same footing here as his adversary, when he came to sue here, and the Court of Chancery had complete control over him.’(q)

“The Counsel for the Appellant :—‘Those learned Lords said nothing in the course of the argument, or in the judgment on the demurrer, as to the King of Spain being obliged to put in an answer on oath. The Court of Chancery did not require an oath from Quakers, Moravians, or Hindoos.’

“Lord Chancellor :—‘Yes; in their cases an oath is required in their own form; and the question always was, what was the ceremonial that amounted to an oath? Here the King of Spain declines an oath, or a ceremonial equivalent to it.’

[*560] “Lords Wynford and Plunkett :—‘Where is it laid down that a *Sovereign cannot take an oath? It is another case whether he can be compelled to take it.’

“The Lord Chancellor :—‘A Sovereign can take an oath; our’s takes his coronation oath.’

“Counsel for the Appellant :—‘But he does not take an oath in cases of controversey in our Courts, nor in matters external to his kingdom. It is impossible for the appellant to do so consistently with his independent sovereign character, according to the principles of the law of nations, as practised between all European States, and his admitted relation to this country as head of the Kingdom of Spain. The appellant tenders an equivalent, as a corporation does.

“‘An infant cannot put in an answer, it is put in for him. So with a lunatic, who answers by his committee; so with a married woman, who answers by another. All these rules are of the creation of the Court of Chancery, which, even in the case of a person who was not a lunatic, controlled its own practice, and appointed a person to put in an answer for him. The case of corporations is the most analogous to the present case, which is new, and in which therefore this House can lay down a rule of practice.

“‘But it is impossible, after examining the history and circumstances of this case, and the position in which the respondents are placed, to contend that an answer from the King of Spain, upon oath, to the respondents’ bill, is in any degree whatsoever necessary, in order to give them the means and opportunity of defence.’

“Lord Chancellor :—‘You are not to assume that the King of Spain has no knowledge of the matters, of which a discovery is sought by the bill; suppose he has something *in gremio*, which no one else can disclose.’

“Counsel for the Appellant :—‘Our impression is, that he cannot take an oath; the law of nations will not allow the independence of a Sovereign to be lost by taking such oath. The appellant is ready to comply with all the forms of an answer except an oath. Being allowed to file a bill as a Sovereign Prince, and in a public character, as trustee for his

subjects, he ought not, and cannot now sink the Sovereign in the individual, and put in an answer on oath to what the respondents call a cross-bill. There is no instance of a foreign Sovereign being made a defendant to a cross-bill and therefore the Court of Chancery or this House is free to lay down the rule for the first time, being quite unfettered by practice, by law, or by Act of Parliament. A corporation supplies an officer who can put in an answer upon oath; appellant is ready to do the same. He tenders M. Escudero, or any other officer on his behalf that the Court of Chancery pleases to call for. The King of Spain is a foreign corporation, and offers an individual who is within the jurisdiction, *who is competent to give all the requisite information, and who can be [*561] dealt with in every way as liable to all the consequences. He states by his affidavit that he has more knowledge of these matters than the appellant can have.'

"The Lord Chancellor:—'Have you any case in which a sole corporation is allowed to put in an answer to a cross-bill without an oath?'

"Counsel for the Appellant:—'We have not. The King of Spain was allowed to sue as a Sovereign; but now, if your Lordships say he must swear to an answer, you batter down the right which you raised, and you nullify the judgment which you formerly gave, for he cannot swear to the answer were the sum in dispute as many millions as it is thousands. If the practical rule to be laid down in the Court of Chancery is, that an accountable agent, trustee, or party resident in England shall not be compelled to answer until the foreign Sovereign, who has appointed him, has answered upon oath what may be ordinarily called a cross-bill (however useless and unnecessary for the purposes of his defence,) the Court of Chancery would in effect be shut against a foreign Prince, and the grossest frauds may be practised against him with impunity by his own or the accountable agents or parties resident in this kingdom, and within the jurisdiction of this Court.'

"Sir Edward Sugden and Mr. James Russell, for the Respondents:—'The appellant has no right to complain that he is kept to the practice of the Court. It was by very sharp practice he obtained the order to amend his bill. That order was first discharged for irregularity, but the respondents' clerk in Court had incautiously accepted the 20s. costs for the amendment; and the appellant, discovering that it was then recently decided that such acceptance was held a waiver of the irregularity, again moved the Vice-Chancellor, who, feeling himself tied down by the order of the Lord Chancellor in *Tarleton v. Dyer*,^(r) restored the order. That is not, however, now the subject of dispute. The first of the orders here appealed from is according to the practice of the Court of Chancery, which is, that if a man files a bill and after answer amends it, and the defendant to it files a cross-bill in the mean time, the plaintiff is bound to answer that cross-bill before he can compel an answer to his amended bill; and the liability to answer his amended bill depends upon his answering the cross-bill. This order is to that effect, and it has been twice confirmed, first by Lord Lyndhurst, and again by the present Lord Chancellor.

(r) 1 Russell & Mylne, 1-7.

“‘But it is asserted for the appellant that this is not a cross-bill, because the appellant is described as a certain individual claiming [*562] *and using the title of “His Catholic Majesty Ferdinand VII., King of Spain, residing at the Palace of the Escorial.” Why, the appellant’s own bill describes him so. All that is required for the cross-bill is, that he be described by his higher title, to entitle us to ask of him to do the same justice to us which he asks for himself. The rule of practice is laid down in Calvin’s case.^(s) If the appellant was not described by his higher title, he might demur or plead. There is no authority to show that a foreign Sovereign sues in any other way than as an individual; only he must have his higher name. But if this be not a cross-bill, why did they not demur, as one of your Lordships observed? We cannot now go into the question, whether this is or is not a cross-bill; or whether we can support the allegations contained in it, or have good grounds of defence to this suit. When the cause comes to be heard on the merits, our clients will absolve themselves before the Court.

“‘The chief question here is, whether the King of Spain can take an oath? What prevents him? Because the King of England cannot take an oath to matters in our Courts, so, it is argued, cannot the King of Spain. But he is to take an oath, if he puts himself into that state in which an oath is required. The Counsel for the appellant says, that the law of nations forbids it, and they offer a representative for His Majesty, to swear to the answer. But our Courts require the oath of the individual who answers. In the case of the *Columbian Government v. Rothschild*,^(t) the like difficulty arose; the plaintiffs there were described as the “Columbian Government,” and their counsel being desired to show who they were, and not being able to do so, the demurrer to the bill was allowed, on the principle that the plaintiff must describe himself so that the defendant might come against him by a bill or a cross-bill. The King of Spain is bound by the same rule that binds others; there is no distinction between suitors. If he came here for justice, what is there to entitle him to an exemption from the rules of justice? The cases of infants or married women have nothing to do with this case. As to corporations aggregate, the officer who has the care of the corporation’s documents is to give the information called for, and the practice is to make him a party to the bill with the corporation; but the King of Spain is not within that class of cases. One of your Lordships asked if there was any instance of a corporation sole being exempted from the general rule of practice? No answer was given, because no instance of the sort could be found. The King of Spain tried to maintain a suit by his agent; he failed; can [*563] he defend a suit by his agent? He is bound to defend *as other suitors do; and the law of England recognises no difference of rank amongst them. The law of nations lays down a doctrine to the same effect, where it says that “the promises, the conventions, all the private contracts of the Sovereign are naturally subject to the same rules as those of private persons.^(u) But the dignity of the King of Spain, it is said, prevents him from taking an oath. He may have such dignity and rank

(s) 7 Coke’s Reports, 30.

(t) 1 Simons, 94.

(u) Vattel, B. ii. c. 14, s. 213, and p. 209, of edit. 1793.

in Spain, but when he leaves his own kingdom and comes for justice into this, his pre-eminences do not accompany him. There is nothing more inconsistent with royal rank than to be sued at all; but if a King be sued, he must act like any other individual. The law is so laid down in Calvin's case, before referred to. The *Columbian Government v. Rothschild* is a decision quite in point, and that decision was sanctioned by Lords Eldon and Redesdale.

“ ‘As to the orders confirming the Master's report on Mr. Browning's affidavit, although the counsel for the appellant seems to have abandoned that part of the appeal, we confidently submit that these orders also were right; and that the affidavit was wholly impertinent, being obviously filed in the hopes of exciting a prejudice against the respondents, by introducing, in the form of a statement upon oath, the conjectures of the appellant's solicitor as to matters irrelevant to this cause. We submit, therefore, that all the orders appealed from are just in principle, and are in conformity with the established law and practice of the Court of Chancery.’

“ ‘The Lord Chancellor:—‘What prevents the King of Spain from transferring his interest in the subject-matter of the suit to a person who can put in an answer on oath?’

“ ‘Mr. Russell:—‘Nothing; his assignee might then file his bill against the respondents, and make the assignor a party defendant, which would certainly place the respondents in some difficulty.’

“ ‘The Attorney-General, in reply:—‘The appellant did not assign his rights, because he could not foresee that this objection would be raised; nor could he properly assign these funds, in consequence of the convention and arrangements with the Government of France, to appoint commissioners in Spain for the distribution of them. The decision in the case of the *Columbian Government v. Rothschild* is not in point; for that was given on the ground that no such Government was known in this country at the time of the contract there mentioned; and the Judge could not acknowledge in our Courts a Government which was not recognised by the Government of our own country.’

“ ‘Mr. Russell denied that that was the ground of the decision of the Vice-Chancellor.

“ ‘The Attorney-General:—‘We took that view of the case. [*564] *This is the time to try whether this is a cross-bill, and not at the hearing on the merits; can this be a cross-bill which states as a set-off to our demand the capture of the Scorpion and Vulture?’

“ ‘Lord Plunkett:—‘Suppose the cross-bill ever so absurd, is that a reason for not answering it on oath?’

“ ‘Attorney-General:—‘It is not a cross-bill, and if it is not, there is an end to the argument. But if it is a cross-bill, then we say, do not compel us to answer on oath, for that will be mockery, as by our original bill we were allowed to sue as Sovereign Prince; and your Lordships cannot now strip the appellant of that character. This is like the case of a bishop suing in right of his see; and the difference between a bishop suing in that right and in his private right is the same as that between the King of Spain and Ferdinand Bourbon in this Court.’

“The Lord Chancellor:—‘Is there any instance to show that *ex comitate* in any Court, in this or any other country, a party shall import with him the modes of proceeding in the Courts of a foreign country? In the Court of Common Pleas a foreign Prince was so far recognised as to be discharged from arrest on giving common bail, by Mr. Justice Heath; and Lord Ellenborough afterwards said he thought that was wrong. That went to the very verge of privilege, but yet not so far as the appellant asks us to go. Suppose a subject of Spain is suitor in our Courts, and says he does not like his cause to be tried by a jury upon oral testimony, &c., can he claim the course of trial of his own country? Is it not the fair course to submit to the laws of the country where he sues?’

“The Attorney-General:—‘The rules of the Court of Chancery are of its own creation, and the question is, whether in this case of novelty and difficulty it may not dispense with an oath. It is a moral impossibility that the King of Spain can answer on oath before a commissioner from our Court of Chancery, in the face of his subjects; that would be stripping himself of his sovereignty, as it would be acknowledging a superior. It would be also unreasonable, as your Lordship allowed him to sue as a foreign Prince. We have not abandoned our objections to any of the orders appealed from, but we submit that the affidavit of Mr. Browning was material, and pertinent to the motion in support of which it was made; and that therefore the orders upon that, as well as the other orders, ought to be reversed, and the appellant allowed to prosecute his suit, and the respondents compelled to put in their answer to his amended bill. We again repeat, on behalf of the appellant, the offer made in the Court below, by which he conceives that he submits to every rule of justice required by the doctrines and jurisdiction of the Court of Chancery in this case.’

“Lord Plunkett:—‘My Lords, it is not my intention to go into the reasons upon which I found my opinion that the orders appealed [*565] from in this case ought to be affirmed; that I will leave to my noble and learned friend, with whom I agree, and who will state the grounds of his opinion. I now move that the orders appealed from be affirmed.’

“The Lord Chancellor:—‘My Lords, I do not see any occasion for postponing the consideration of the judgment to which I think your Lordships ought to come in this case. The more I see of it, the more I am inclined to affirm the orders of the Courts below. I took occasion, during the argument at the bar, to throw out my opinion, that though the King of Spain sues here as a Sovereign Prince, and is justly allowed so to sue, yet, beyond that, he brings with him no privileges that can displace the practice as applying to other suitors in our Courts. The practice of the Court is part of the law of the Court; if any instance could be adduced in which the Court deviated from the general practice, or by which the Court was divested of the power of applying the universal rule, I should concede to that, and it would assist me in giving the plaintiff relief. Your Lordships’ decision upon the demurrer did not dispose of this point; but it is clear to my mind that if the present question had been then mooted

before your Lordships, it would have been disposed of in the same way. One of the grounds of Lord Lyndhurst's decision is, that the appellant should be on the same footing with his adversary, subject to the control of the Court, and liable to the rules of practice. It was impossible to read the judgment in the case of the *Columbian Government v. Rothschild*, without seeing that the present Master of the Rolls in giving that judgment proceeded on the same view of the matter. The noble and learned lord who assisted yesterday at the argument, authorized me to say that he concurred in the decision of the Court below. The reluctance which the Court below had in coming to that decision was, that there was an appearance of an advantage being taken by one party. But it would be improper to state that in this stage of the proceedings. I concur in the proposition of my noble and learned friend.'

"The question was then put, and the orders of the Courts below affirmed with costs."

No. 4.

ROTHSCHILD *v.* QUEEN OF PORTUGAL.(x)

"THE bill was brought for discovery from the Queen of Portugal as to the matters stated in the bill, and for a commission to examine *witnesses in Portugal, and for an injunction to restrain an action [*566] commenced against the plaintiff by the Queen of Portugal. It appeared that the Portuguese Government had deposited with the plaintiffs certain Portuguese bonds, as a security for moneys advanced by them to the Government, and that a contract had been entered into by the plaintiffs with the Queen's agents in England, by which it was agreed that, on certain events, the plaintiffs should sell the bonds, and place the produce of the sale to the credit of their account with the Portuguese Government. The plaintiffs sold the bonds, but claimed interest on their advances, and set up that claim in defence to the action; the Queen's agents denying their right to such interest, on the ground of delay in selling the bonds. The plaintiffs now sought by their bill for discovery of certain correspondence, and other matters in aid of their defence to the action.

"The Queen demurred to the bill on two grounds, first, that, as a Sovereign, the suit was not maintainable against her; and secondly, that the plaintiffs had made no case for discovery.

"The leading arguments for the demurrer were, that the defence was purely a legal question arising out of the contract itself, which must be proved in the action, or otherwise the plaintiff could not recover. That the discovery, therefore, was immaterial. That, moreover, the bill did not allege, nor did it appear that the Queen could make any discovery which might not be had *aliunde*, or that she had concealed or refused to discover any facts material to the plaintiff's case. Lastly, that she could not be made a defendant to this suit, the matter not being of a personal nature, and that this case differed from that of the *King of Spain v. Hul-*

(x) 3 Young & Collyer's Rep. 594, (June 24, 1839.

let(*y*) in that respect; for there the King having filed a bill in Chancery to recover a sum of money, a cross-bill was filed against him, charging him with personal fraud.

“Alderson B.—‘In this case I expressed at the hearing my opinion on several points; but before I gave my opinion finally on the whole case, I wished to have an opportunity of reading the bill, in order to ascertain whether any part of the discovery prayed by the plaintiff was material to the question at issue in the Court of Law. The question there clearly is, whether the delay in selling the Portuguese bonds deposited as the collateral security for a debt, clearly, under ordinary circumstances, bearing interest, was such laches, on the part of Messrs. Rothschild, as to deprive them of the right of charging Her most Faithful Majesty with such interest in the account current between them. Now, if the conduct of Her Most Faithful Majesty, through her lawfully authorized agents, was such as to induce Messrs. Rothschild, as reasonable men, to suppose that by [*567] such delay they were *acting in conformity to Her Majesty’s wishes, they would justly be entitled to charge her with that interest. Now, if the letters charged in the bill to have been written by her authority were so written, I think many of them, at all events, if not the whole correspondence, very proper to be laid before a jury in order to prove that fact. Then if so, the bill which prays, amongst other things, a discovery whether those letters were so written, prays a discovery material to the plaintiffs’ defence at law. It may be true that part of the discovery prayed goes beyond the discovery to which the plaintiffs are by law entitled. But this is immaterial upon the present demurrer, which is a demurrer to the whole bill, and is not confined to the objectionable parts of it.

“‘I am therefore of opinion that Her Most Faithful Majesty, being a suitor voluntarily in a Court of English law, becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity. That the discovery prayed by this bill is material to the plaintiffs’ defence at law in that suit, and that this demurrer is too large and must be overruled, and that it must be with costs.”

“Demurrer overruled.”

No. 5.

Hilary Term, 7 Victoria.

THE DUKE OF BRUNSWICK *v.* THE KING OF HANOVER.

Argued before the Master of the Rolls, November 20th, 21st, 22nd, and 23rd, and Judgment given January 13th, 1844.(z)

Pleading—Demurrer—Process—Jurisdiction—Equity—Sovereign—Prince—Subject—Void Instrument—State Transactions.

“A bill was filed by Charles Frederick, Duke of Brunswick, against the King of

(*y*) 1 Clark & Finelly, 333.

(*z*) Law Journal (Chancery,) vol. xiii. p. 107.

Hanover, who was sued as Ernest Augustus, Duke of Cumberland and Tevoitdale, in Great Britain, and Earl of Armagh, in Ireland. The bill prayed a declaration that a certain instrument, dated the 6th February and 14th March, 1833, and the appointment of the Duke of Cambridge as guardian of the fortune and property of the plaintiff, and of the persons appointed managers under him, and the subsequent appointment of the defendant as such guardian, were absolutely void; and that the defendant was liable to account to the plaintiff for the property and effects of the plaintiff possessed by the defendant, and that accounts might accordingly be taken. It stated that in 1830 the plaintiff was the reigning Duke of Brunswick, and was, in his private capacity, possessed and entitled to real and personal property, of great amount in Brunswick, England, Hanover, France, and elsewhere in Europe; and that the Duchy of Brunswick bordered on the Kingdom of Hanover; that in September, 1830, King William IV. of England was King of Hanover, and the Duke of Cambridge Viceroy of Hanover, acting under the authority of the former; that pending a revolutionary movement, in 1830, in Brunswick, a decree of the Germanic Diet was made, whereby the plaintiff's brother, Duke William, became Duke of Brunswick; that the plaintiff was thereby dethroned; that by an instrument, dated in the year 1833, signed by King William IV. and William Duke of Brunswick, the plaintiff was deprived of the management of his fortune, and the Duke of Cambridge appointed supreme guardian, with power to appoint administrators of the fortune of the plaintiff, who were to account to the Duke of Cambridge; that the guardianship was to be considered as legally established in Brunswick, where it was to have its locality; that the last-mentioned document was approved of and signed by the Dukes of Cumberland, Sussex, and Cambridge. The bill then charged, that the last-mentioned document was void; but that nevertheless the Duke of Cambridge possessed himself of the private property of the plaintiff, amounting to several hundred thousand pounds; that on the death of King William IV., the defendant was, by some instrument, purported to be appointed guardian of the plaintiff's fortune and property, in the place of the Duke of Cambridge; that the said appointments of guardians were invalid, according to the laws, as well of Brunswick and Hanover, as of Great Britain; that the receipts and payments by the Duke of Cambridge and the defendant respectively, on account of the plaintiff, and the management of his property, constituted a mutual account, and that the same was still open and running, and, being intricate in its nature, could only be taken in a Court of Equity; that the plaintiff was resident and domiciled in England; and that the plaintiff and defendant were respectively subjects of the Crown of Great Britain and Ireland; that the defendant was a peer of this realm; and that his title, as such, was His Royal Highness Ernest Augustus, Duke of Cumberland and Tevoitdale in Great Britain, and Earl of Armagh in Ireland; and that since his arrival in this country, and during his residence here, he had exercised, and still exercised, rights and privileges as such peer as aforesaid.

"The defendant, whilst temporarily resident in this country, was served with the process of the Court in this suit, upon which he applied to the Lord Chancellor to relieve him from such process; but his Lordship refused the application. The defendant then appeared to the bill, and afterwards filed a general demurrer thereto, for want of jurisdiction and want of Equity;—

"Held, that the appearance of the defendant to the bill was no waiver of any defence he might have; and that the refusal of the Lord Chancellor to relieve the defendant from the process of the Court which had been served on him, had not the effect of deciding that the defendant was liable to the jurisdiction of the Court.

"Held, that the defendant was exempt from the jurisdiction of the Courts in this country, for any acts done by him as King of Hanover, or in his character of Sovereign Prince; but that being a subject of Her Majesty Queen Victoria, he was liable to be sued in the Courts of this country in respect of any acts and transactions done by him, or in which he might have been engaged as such subject; and that in respect of any act done by him out of this realm, or any act as to which it might be doubtful whether it ought to be attributed to the character of Sovereign Prince or to the character of subject, the same ought to be presumed to be attributable rather to the character of Sovereign Prince than to the character of subject.

"Held, also, that in a suit in this Court against a Sovereign Prince, who is also a subject, the bill ought, upon the face of it, to show that the subject-matter of it constitutes a case in which a Sovereign Prince is liable to be sued as a subject.

"Although with regard to English instruments intended to operate according to English law, the Court may be able, even on demurrer, in a simple case, to adju-

dicare thereon, upon a mere allegation that the instrument is null and void; yet with regard to a foreign instrument, intended to operate according to a law not known in England, an allegation that the instrument is void is too vague.

"Sembles.—The instrument complained of in the present case was, under the circumstances stated in the bill, connected with political and state transactions, and was a state document."

THIS case came on to be heard on a demurrer to the plaintiff's bill for want of jurisdiction and want of equity.

[*568] *"Sir Charles Wetherell, Mr. Pemberton Leigh, and Mr. Elmsley, appeared in support of the demurrer.

"Mr. Kindersley, Mr. G. Turner, and Mr. Heathfield, *contra*."

The statements in the bill and the arguments at the bar having been embodied by the Master of the Rolls in his judgment, it has not been deemed proper to repeat them here.(a)

[*569] *"Judgment.

"January 13th, 1844.—The Master of the Rolls:—"The bill is filed by His Serene Highness Charles Frederick William Augustus, Duke of Brunswick, against His Majesty the King of Hanover, who is sued as His Royal Highness Ernest Augustus, Duke of Cumberland and Tevoitdale in Great Britain, and Earl of Armagh in Ireland.

"The bill prays, that it may be declared, that a certain instrument or writing, in the bill mentioned to be dated the 6th of February and the 14th of March, 1833, and the appointment of His Royal Highness the Duke of Cambridge as guardian of the fortune and property of the plaintiff, thereby purported to be made, and of the persons purported to be appointed administrators and managers under him, and the subsequent appointment of the defendant as such guardian, are absolutely void and of no effect; and that it may be declared that the defendant is liable and ought to account to the plaintiff for the personal estate, property, and effects, and the rents, profits, and produce of the sale of the real estates possessed by the defendant, or any person by his order, or for his use, or

(a) The following authorities were cited in the course of the arguments:—

Calvin's Case, 7 Coke's Rep. 15, b. Nabob of the Carnatic v. East India Company, 1 Ves. jun. 371; s. c. 3 Bro. C. C., 292. The Columbian Government v. Rothschild, 1 Sim. 94; s. c. 5 Law J. Rep. Chanc. 43. Glyn v. Soares, 1 You. & Col. 644; s. c. Law J. Rep. (N. S.) Ex. Eq. 49. Stat. 7. Ann. c. 12. 1 Black. Com. 253. Lockwood v. Coysgarne, 3 Bur. 1676. Viveash v. Becker, 3 Mau. & Selw. 284. Fisher v. Begrez, 1 Cr. & M. 117; s. c. 5 Law J. Rep. (N. S.) Ex., 13. Vattel, l. ii. c. xiv. s. 213. Ib. l. iv. c. v. s. 55, p. 452. Vattel, c. vii. s. 80, p. 464. Ib., s. 81, ib. Ib., c. vii. s. 92, p. 470. Ib., c. viii. s. 110, p. 488. Ib., s. 112, p. 490. Ib., s. 113, p. 491. Ib., s. 114, p. 492. Ib., s. 115, p. 493. The Corporation of Carlisle v. Wilson, 13 Ves. 276. Stat. 1 Geo. I., st. xiii. s. 2. Stat. 13 Will. III., c. vi. s. 10. De la Toire v. Bernales, mentioned in 1 How. Sup. 149. Cases of John Baliol, King of Scotland, summoned by Edward I. of England; and of Edward I. of England summoned by Philip le bel of France, as Duke of Guienne. Melan v. the Duke de Fitzjames, 1 Bos. & Pul. 138. De la Vega v. Vianna, 1 B. & Ad. 284; s. c. 8 Law J. Rep., K. B. 388. Hullet v. the King of Spain, 2 Bli. (N. S.) 31; s. c. 1 Dow & Cl. 169. The King of Spain v. Hullet, 1 Cl. & Fin. 333; s. c. 7 Bli. 359. Grotius, Law of Nations, b. ii. c. xiv. s. 101. Story on the Conflict of Laws (2nd Edit.,) c. viii. s. 244, p. 322. Earl of Derby v. Duke of Athol, 1 Ves. sen. 292. Novello v. Toogood, 1 B. & C. 554; s. c. 1 Law J. Rep., K. B., 181. Co. Lit. (Hargrave's edit.) s. 180. Selden's Table Talk, "Equity," pp. 83, 128, (a) note. Money v. Leach, 1 W. Black. 563.

any person having acted or purported to act under any appointment as administrator or manager under the defendant, since his appointment as guardian *by virtue of the instrument of the 6th of February and the 14th of March, 1833, including therein the personal estate [*570] and effects, rents, profits, and produce of the real estate paid or accounted for to the defendant by the Duke of Cambridge; and that such accounts may be accordingly taken—the plaintiff offering, on the taking of such accounts, to make the defendant all just allowances.

“ ‘ For this purpose, the bill states that in the year 1830 the plaintiff was the reigning Duke of the Duchy of Brunswick, and was, in his private character or capacity, possessed of and entitled to real and personal property in Brunswick, and in England, Hanover, France, and elsewhere in Europe, to a very considerable amount; that the Duchy of Brunswick bordered on the Kingdom of Hanover; and that in the month of September, 1830, His late Majesty King William IV. was King of Hanover, and His Royal Highness Adolphus Frederick, Duke of Cambridge, was Viceroy of Hanover, acting under the authority of His late Majesty King William IV.: that pending a revolutionary movement in Brunswick, a decree of the Germanic Diet of Confederation was made on the 2nd of December, 1830, whereby the plaintiff’s brother, William, Duke of Brunswick, was invited to take on himself provisionally the government of the duchy; and the Diet left it to the legitimate dynasty of the plaintiff to provide for the future government of the duchy; and that in February, 1831, His late Majesty King William IV. and William, Duke of Brunswick, claiming to be the legitimate agnati of the plaintiff, caused to be published a declaration, whereby they purported to dethrone the plaintiff from the throne of the duchy, and declared that the throne had passed to Duke William; and that after this declaration was made, it was signed by their Royal Highnesses the Duke of Cumberland (the present defendant,) the Duke of Cambridge, and the Duke of Sussex; and that in pursuance of the declaration, William, Duke of Brunswick took upon himself the government of the duchy, and he had ever since exercised the rights, powers, and authorities of Sovereign Duke of Brunswick.

“ ‘ The bill then proceeds to state, that early in the year 1833, an instrument in writing, dated the 6th of February and the 14th of March in that year, signed by His late Majesty King William IV., and by William, Duke of Brunswick, was promulgated by them, and was to the effect following, viz. :—

“ ‘ ‘ We, William IV., by the grace of God, King of the United Kingdom of Great Britain and Ireland, and of Hanover, Duke of Brunswick and of Lunenburgh, make known what follows: Moved by the interests of our house, whose well-being is confided to us, and yielding to a painful, but inevitable necessity, have thought it necessary to consider what measures the interests (rightly understood) of His Highness Charles, Duke of Brunswick (the plaintiff,) the preservation of the fortune now in his hands, the dangers and *illegality of the enterprises pursued by the said Duke, and lastly, the honour and dignity of our house, [*571] may require: and after having heard the advice of a Commission, charged

by us with the examination into this affair, and after having weighed and exactly balanced all points of fact and law ; and whereas after the dissolution of the Germanic Empire, the powers of supreme guardianship over the Princes of the Empire, which, up to that period, had appertained to the Emperor, devolved on the heads of Sovereign States, we, taking into consideration the laws and customs, by virtue of the rights unto us belonging, in quality of heads of the two branches of our house, have decreed as follows :—

“ “ Article I.—Certain facts, either notorious, or sufficiently proved, have caused us to arrive at the conviction, that His Highness Duke Charles is at this time wasting the fortune which he possesses in enterprises alike impossible and dangerous both to himself and other persons, and is seeking to damage the just claims which certain persons interested, now or hereafter, may legally have upon his property, we have consequently considered, that the only method of preserving the fortune of His Highness Duke Charles from total ruin, is to appoint a guardian over him.

“ “ Article 2.—In consequence of this conviction, we decree that Charles, Duke of Brunswick, shall be deprived of the management and administration of his fortune ; a guardian shall be appointed, whom we shall choose by mutual consent from amongst the very noble or noble male scions of our house, although the right of choice belongs to the legitimate Sovereign of the Duchy of Brunswick, in virtue of his title alone.

“ “ Article 3.—His Royal Highness the Duke of Cambridge, Viceroy of Hanover, having declared that he will willingly accept such guardianship, we confide the same to His Royal Highness by the present decree, which he will be pleased to consider as constituting his title to such guardianship.

“ “ Article 4.—As His Royal Highness the Duke of Cambridge cannot, by reason of his position, by himself alone exercise the functions of guardian, he is authorised to limit himself to the functions of supreme guardian, and to substitute for the management and administration of the property one or more persons, who, under oath, will proceed in their own name, and on their own personal responsibility, to make an inventory of the same, and to take measures for the preservation and administration of the fortune placed under the guardianship of His Royal Highness, the supreme guardian, who is to be at liberty to grant them fees proportionate to their duties.

“ “ Article 5.—The administrators shall render an annual account of their management to His Royal Highness, the supreme guardian, who shall be asked to transmit the same to us, that we may cause the same [*572] to be settled and approved. Our confirmation *shall be applied for in all cases wherein the laws require the consent of the supreme guardian.

“ “ Article 6.—The guardianship is to be considered as legally established in Brunswick, where it is to have its locality.

“ “ Article 7.—The present decree shall be published in the bulletin of the laws of the kingdom, in accordance with the usual forms ; and all whom the same may concern are bound to render obedience thereto.”

“ ‘This is dated at St. James’s, the 6th of February, and at Brunswick the 14th of March, 1833. It is signed by the King of Hanover, William IV., King of England, and by William, the reigning Duke of Brunswick.

“ ‘To this instrument was subjoined a Note, which was signed by the defendant, then Duke of Cumberland, and by the Dukes of Sussex and Cambridge, to the effect following:—

“ ‘ ‘We, the undersigned, have acknowledged with gratitude the foregoing arrangement adopted by His Majesty, in accordance with His Highness, the reigning Duke of Brunswick, in the interests well advised of His Highness the Duke Charles of Brunswick, for the preservation of the fortune remaining in his hands, for the maintenance of the public peace in the Duchy of Brunswick and in the Kingdom of Hanover, and for the honour and dignity of the great house of Brunswick Lunenburgh, another proof of the foresight of His Majesty and of His Highness for the well-being of that house; we solemnly attest the declaration by these presents, signed with our hands, and to which we have placed our seals.

“ ‘ ‘London, 6th February, 1833. ERNEST. (L. S.)

Kensington, 3rd February, 1833. AUGUSTUS FREDERICK. (L. S.)

Hanover, 13th February, 1833. ADOLPHUS. (L. S.)”

“ ‘The bill then states, that the plaintiff is advised, as the fact is, that the said instrument is absolutely void and of no effect; but that nevertheless the Duke of Cambridge accepted the appointment of supreme guardian of the plaintiff’s fortune and property, took possession of the real estates to which he was entitled in his private capacity at Brunswick, and took possession of all such parts of the plaintiff’s property in Brunswick and elsewhere, of a personal nature, as he could discover, to the amount of several hundred thousand pounds, in the whole: that he sold and converted several parts thereof into money, and made certain payments on account of the plaintiff, and of his property; but that after allowing for such payments, there remained in his hands a very large surplus unaccounted for; that King William IV. died on the 28th of June, 1837, and thereupon the present defendant became King of Hanover; and the Duke of Cambridge having resigned his appointment of guardian by some instrument*in writing, to which the defendant was a party, and which was signed by him and by William Duke [*573] of Brunswick, the defendant was purported to be appointed guardian of the plaintiff, and of his fortune and property, in the place of the Duke of Cambridge, under the instrument of the 6th of February and the 14th of March, 1833, and with all the same powers and authorities as were thereby purported to be conferred on the Duke of Cambridge: that the Duke of Cambridge accounted for his receipts and payments to the defendant, and paid him the balance; and that the defendant took possession of the plaintiff’s property, and has received large sums of money on account thereof, and has thereout made some payments on account of the plaintiff; and that a very large balance or surplus, to the amount of several hundred thousand pounds, remains due from the defendant to the

plaintiff on account thereof; and that the defendant refuses to comply with the plaintiff's application, for an account thereof.

“ ‘The bill charges, that the instrument of the 6th of February and the 14th of March, 1833, and the appointment of the Duke of Cambridge as guardian, and the appointment of the defendant as guardian, are wholly invalid, according to the laws as well of Brunswick and of Hanover, as of Great Britain; but that under colour thereof, the Duke of Cambridge and the defendant respectively took possession of the plaintiff's property on his behalf, and not adversely; that by the law of England, such appointments of guardians, and all the rights thereby purported to be given, are void, even if the same were valid by the law of Brunswick; and that if the same were valid at the time when the same were issued, having regard to the circumstances and situation of the plaintiff at the time (which, however, the plaintiff denies,) there is now nothing in the circumstances, or conduct, or state of mind of the plaintiff to debar him from the full right and power of enjoyment and disposition of his property.

“ ‘There is a charge that the receipts and payments by the Duke of Cambridge and the defendant respectively, on account of the plaintiff, and the management of his property, constitute a mutual account containing many items as well on the debit as on the credit side thereof; that such account is still open and running, and is of an intricate and complex nature, and can only be taken in a Court of Equity.

“ ‘There are also charges relating to the administrators and managers who were appointed by the Duke of Cambridge, and are alleged to have accounted to the defendant, and a very long statement of certain proceedings in France, in which it is alleged that the Duke of Cambridge attacked, but failed in an attempt to establish a claim to the plaintiff's property in that country; a specification of certain property alleged to have been seized by the Duke of Cambridge and the defendant respectively; and the *statement of a transaction alleged to have taken place at Osterode in November or December, 1830.

“ ‘The plaintiff having, in an earlier part of the bill, stated, that from a time previous to the Duke of Cambridge resigning the appointment of guardian, until within a few weeks past, the defendant had been residing in Hanover, out of the jurisdiction of this Court; and having charged that the plaintiff was resident and domiciled in England, and that the plaintiff and defendant were respectively subjects of the Crown of Great Britain and Ireland, concludes the charging part of the bill by charging, that the defendant is a Peer of this realm, and that his title as such is His Royal Highness Ernest Augustus, Duke of Cumberland and Tevoitdale in Great Britain, and Earl of Armagh in Ireland; and that since his arrival in this country, and during his residence here, he had exercised, and still exercises, rights and privileges as such Peer as aforesaid.

“ ‘It has been stated to me as a fact on both sides, that the plaintiff availed himself of a temporary residence of the defendant in this country to serve him with the process of this Court; and that the defendant before he appeared to the bill, and consequently before the demurrer was filed, applied to the Lord Chancellor to be relieved from the process; that the

Lord Chancellor refused the application; and that thereupon the defendant appeared to the bill in the usual manner: and upon this state of things the plaintiff has founded an argument, which, if valid, would make it unnecessary for me to consider the principal question upon the demurrer. The plaintiff has contended, first, that the appearance of the defendant to the process ought to be deemed a waiver of any claim to personal exemption from liability to be sued; and secondly, that the refusal of the Lord Chancellor to relieve the defendant from the process ought to be considered by me as a decision of the Lord Chancellor, that the defendant is subject to the jurisdiction of this Court with reference to the subject-matter of this bill.

“ ‘As to the first of these points, it would be singular if appearance, which is the first step towards making a defence, should be deemed an abandonment or waiver of any defence which the defendant may have. An appearance may be a waiver of any mere irregularity in the service of process; but I am of opinion that it is no waiver of such a defence as is now made, and which the defendant has clearly a right to submit to the consideration of the Court. He claims to be exempt from liability to be sued, but he nevertheless appears, in order that he may, in a regular manner, inform the Court of the reasons upon which his claim is founded. As to the other point, it appeared to me very improbable that the Lord Chancellor, in refusing to stay the process upon a bill, the contents of which were not regularly known to him, could have *meant to decide that the defendant was, with reference to the contents of [*575] the bill, liable to the jurisdiction of the Court. Upon this part of the case I have, however, thought it right to communicate with the Lord Chancellor, who has informed me, that in declining to interfere with the process, he did nothing which could in any way prevent the defendant from making any defence which was open to him in the usual course of proceeding; and that he gave no opinion upon the question of jurisdiction in the particular case. It is, therefore, incumbent upon me to consider the defence made to this bill by the present demurrer.

“ ‘In support of the demurrer for want of jurisdiction, the following are amongst the principal propositions advanced on behalf of the defendant:—First, he is by the bill admitted to be King of Hanover, a Sovereign Prince, recognised as such by the Crown of England. As a Sovereign Prince his person is inviolable, and he is not liable to be sued in any Court. Second, the inviolability of a Sovereign Prince is not confined to his own dominions, but attends him everywhere. Though a King be in a foreign kingdom, yet he is judged in law a King there.—(7 Coke, 15.) Third, his inviolability is not affected by his being temporarily resident in a foreign kingdom, of which he is a subject. The defendant is not the less a Sovereign Prince, and not the less exempt from being sued in any Court here, because he is a subject of the Queen and a Peer of the realm. Fourth, even if the defendant should be held liable to be sued for some things in this country, he ought not to be held liable to be sued in respect of the particular subject-matter of this suit, which is alleged to be matter of State, and not matter of forensic jurisdiction. Fifth, and finally, even if the defendant should be held liable to be sued

here, and if the subject-matter of the suit should be held to be matter of forensic jurisdiction, yet that it is not matter subject to the jurisdiction of this Court, but is matter which must be deemed to be subject to the jurisdiction of some Court of special and peculiar jurisdiction, such as in this country are proceedings arising in lunacy, bankruptcy and various other matters, which, although proper subjects of forensic jurisdiction, can only be adjudicated upon in Courts specially appointed for the purpose.

“ ‘On the other hand, the following are amongst the principal propositions advanced in support of the bill on behalf of the plaintiff:—First, this ought to be considered as an ordinary suit between subject and subject. The plaintiff and defendant are lineal descendants of the Princess Sophia, Electress and Duchess Dowager of Hanover, and as such (4 Ann c. 4,) are, to all intents and purposes, to be deemed natural-born subjects of this realm. The plaintiff is domiciled here. The defendant was born here, is an English Peer, and has taken the oath of allegiance (1 Geo. I. stat 2, c. 13.) Second, no English subject can withdraw from his allegiance and subjection to the law of the *land. His becoming a [*576] Sovereign Prince of another country can make no difference in this respect: he remains an English subject, and is bound to obey the laws of England. Third, the law of England affords no authority for the proposition, that Sovereign Princes, resident here may not be sued in the Courts here; and there are dicta to the contrary; as in Calvin’s case it is said, that if a King of a foreign nation come to England by the leave of the King of this realm, (as it ought to be) in this case he shall sue and be sued by the name of a King; and it is reported, that in the case of *De la Torre v. Bernales*, Sir Sohn Leach stated it to be his opinion that foreign Sovereigns could both sue and be sued in this country. In support of this proposition, reference was made to proceedings in which John Baliol, King of Scotland, was summoned to answer charges made against him in the Court of Edward I., King of England; and to proceedings in which Edward I., King of England, was summoned to answer charges made against him in the Court of Philip le Bel, King of France, at Paris. But these cases have nothing to do with the question: they were respectively adopted in virtue of and for the purpose of enforcing the superiority which Edward I. claimed to have over the Kingdom of Scotland, and the superiority which the King of France had over the province of Guienne. Fourth, liability to suit does not necessarily involve liability to coercion. The defendant, as an English Peer, is by privilege protected from personal coercion; and even if a Sovereign Prince, without such peculiar privilege, were a defendant here, this Court has power so to modify its process as at the same time to do justice to the plaintiff, and have due regard to the person and dignity of the defendant. Fifth, the law of nations, the general law, and the common interest of all mankind, is, that justice should be done all over the world. The right of a suitor here is not to be impeded by the assertion of an unrecognised privilege in any person against whom he has a legal demand. Sixth, the Queen of England is liable to be sued in a proper form—a form not applicable to a foreign Sovereign; but if a foreign Sovereign were not liable

to be sued here at all, he would be placed in a better situation than our own Sovereign, which, it is said, would be absurd.

“ These propositions are all of them more or less important to be considered on the present occasion, and I have thought it convenient to enumerate them, although I shall not have occasion to observe upon them all in stating the grounds of the opinion which I have formed on this demurrer. The general proposition of the defendant is, that by reason of his character of a Sovereign Prince, he is exempt from the jurisdiction of any tribunal or Court in this country. His limited or modified proposition, adapted to the specialties of this case, is, that he is exempt from the jurisdiction of any tribunal in this country, in *respect of [577] acts done in a foreign country, under foreign authority and in no way connected with his own character of English Peer and English subject. It has been fully established—The King of Spain v. Machado,^(t) Hullet v. the King of Spain, and see *Roi d’Espagne v. Pountes*,^(u) Bulstrode, 322, Hobart, 78, 113, Moore, 850, Barclay v. Russell,^(x) Dolder v. Lord Huntingfield^(y)—that a foreign Sovereign may sue in this country both at law and in equity; and further, that if he sues in a Court of Equity, he submits himself to the jurisdiction of the Court. A cross-bill may be filed against him, and he must put in his answer thereto, not by any officer, agent, or substitute, but personally, upon his own oath. The King of Spain v. Hullet, Lord Redesdale^(z) considered, that to refuse a foreign Sovereign the right of suing in our Courts might be a just cause of war; and the liability of a foreign Sovereign to be sued in a case where he himself was suing here, was founded upon the principle that by suing here he had submitted himself to the jurisdiction of the Court in which he sued. The decision is in accordance with the rules of the civil law. The *Reconventio* is a species of defence, and “ *Qui non cogitur in aliquo loco iudicium pati si ipse ibi agit, cogitur excipere actiones et ad eundem iudicem mitti.*”—Digest, 4, j., 2, 22, Corpus Juris Civilis, p. 131. In the case of Glyn v. Soares, it was supposed that a person who was not party to an action, but whose agent was, on his behalf, the plaintiff, might be made a defendant to a bill in equity, for discovery in aid of the defence to the action, and on that supposition it was held that the Queen of Portugal was properly made a defendant to the bill. Her demurrer was, however, allowed in the House of Lords,^(a) where it was held that such bills of discovery could only be sustained against parties to the action. If she had been plaintiff in the action, I presume that she would have been held to be a proper defendant to the bill. The case mentioned by Selden in his Table Talk (Law 3,) was probably of the same sort: there were many suits pending between the King of Spain and English merchants; a merchant had recovered costs against him in a suit, and could not get them, and process of outlawry was taken out against him for not appearing; but the circumstances are not stated with such particularity as to make it practicable to draw any

(t) 4. Russ. 560.

(u) Roll. Abr., tit. “Court de Admiraltie” (E) 3; s. c. 1 Roll. Rep. 133.

(x) 3 Ves. 432.

(y) 11 Ib. 283.

(z) 2 Bligh (N. S.) 60.

(a) The Queen of Portugal v. Glyn, 7 Cl. & Fin. 466.

conclusion from them. The *cases which we have upon this point [*578] go no further than this, that where a foreign Sovereign files a bill, or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defence to the proceeding, which the foreign Sovereign has himself adopted. There is no case to show that, because he may be plaintiff in the Courts of this country for one matter, he may therefore be made a defendant in the Courts of this country for another and quite a distinct matter; and the question to be now determined is independent of the fact stated at the bar, that the King of Hanover is, or was, himself plaintiff in a suit for an entirely distinct matter in this Court.(b)

“ ‘There have been cases in which this Court, being called upon to distribute a fund in which some foreign Sovereign or State may have had an interest, it has been thought expedient and proper, in order to a due distribution of the fund, to make such Sovereign or State a party. The effect has been, to make the suit perfect as to parties, but as to the Sovereign or State made a defendant in cases of that kind, the effect has not been to compel or attempt to compel, such Sovereign or State to come in and submit to judgment in the ordinary course, but to give the Sovereign an opportunity to come in and claim his right or establish his interest in the subject of the suit. Coming in to make his claim, he would, by doing so, submit himself to the jurisdiction of the Court in that matter; refusing to come in, he might, perhaps, be precluded from establishing any claim to the same interest in another form. So where a defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign Sovereign, the suit would not be perfect as to parties, unless the foreign Sovereign were formally a defendant, and by making him a party, an opportunity is afforded him of defending himself, instead of leaving the defence to his agent, and he may come in if he pleases; and in such a case, if he refuses to come in, he may perhaps be held bound by the decision against his agent.

“ ‘There may be other cases in which Sovereign Princes, for the sake of having a claim or right determined, may have been afforded an opportunity of appearing, and may have voluntarily appeared as defendants before the tribunals of this country; but save in the case of a cross-bill or bill of discovery, in aid of a defence, and in the case of a Sovereign Prince voluntarily coming in to make or resist a claim, it does not appear how he can be effectually cited, or what control the Court can have over him or his rights, and no case has been produced in which it *has [*579] been determined that a foreign Sovereign, not himself a plaintiff or claimant, and insisting upon his alleged right to be exempt from the jurisdiction of the ordinary Courts, has been held bound to submit to it. On the other hand, no case has been produced in which, upon the question properly raised, it has been held that a Sovereign Prince, resident within the dominions of another Prince, has been held to be exempt from the jurisdiction of the Courts of the country in which he is. In the case

(b) *The King of Hanover v. Wheatley*, 4 Beav. 78; s. c. 10 Law J. Rep. (N. S.) Chanc. 253.

of *Glyn v. Soares*, the question was not mooted at the bar, but Lord Abinger took it into consideration, and distinctly expressed his opinion that, as a general proposition, a Sovereign Prince could not be made amenable to any Court of judicature in this country; and upon this occasion, the defendant insists upon it as a general rule, that, in times of peace at least, a Sovereign Prince is, by the law of nations, inviolable; that obvious inconvenience, and the greatest danger of war, would arise from any attempt to compel obedience to any process or order of any Court, by any proceeding against either the person or the property of a Sovereign Prince; and, indeed, that any such attempt would be a hostile aggression, not only against the Sovereign Prince himself, but also against the State and people of which he is the Sovereign: that it is the policy of the law (to be everywhere taken notice of,) that such risks ought to be avoided, and that this view of the subject ought of itself to induce the Court to allow this demurrer. If a foreign Sovereign could be made personally amenable to the Courts of a country in which he happened to reside, he must be subject to the ordinary process of the Courts, and if not protected by any privilege legally established by the law of England, he would in this country be subject to the execution of writs of attachment and *ne exeat regno*, and other processes upon which he might be arrested, and upon this the counsel for the defendant cited the opinion of Vattel, who considered it to be a ridiculous notion and an absurdity to think that a Sovereign who enters a foreign country, even without permission might be arrested there.—Vattel 4, 7, s. 108, p. 486.

“ ‘It was attempted to meet the force of this argument by alleging that this Court has authority to modify the means of executing its process and compelling obedience to its orders, so as to suit the rank or dignity of particular defendants; but this allegation was not supported by any authority or by reference to any known law or practice of the Court. In the case of the King of Spain, it was stated that his right “in respect of privilege in the Courts of England was not greater than that of any of his subjects;” and the Lord Chancellor said, “the King of Spain sues here by his title of Sovereign, and so he must be sued, if at all; but beyond the mere name of Sovereign, it has no effect. He brings with him no privileges which exempt him from the common *fare of [*580] other suitors.” I am of opinion that the only exemptions from the ordinary effects of the process of this Court are privileges which have a recognized legal origin, and that no others can be allowed. To show that a Sovereign Prince carries his prerogative with him into the dominions of other Princes, reference was made to the case of *Engelramo de Nogent*, stated in *Fleta*, lib. 2, ch. iii. s. 9, p. 68, and cited in *Calvin’s case*, and also in *Moore*, 798. This man was an attendant upon Edward I., King of England, when in France; he committed a theft there, and was apprehended for it by the French, but the King of England required to have him redelivered, being his subject, and of his train, and upon dispute in the Parliament of Paris, he was sent to the King of England, to do his own justice upon him; whereupon he was tried before the Steward and Marshall of the King of England’s house, and executed in France. At a more recent period, *Monaldeschi*, an attendant upon

Christina, the abdicated Queen of Spain, was by her orders put to death within her residence in France^(c)—a fact in itself atrocious, but which was not seriously resented by France; and it is said to have been afterwards defended by great authority. Bynkershoek speaks of it thus:—“*Quod factum Galli quamvis indignabundi impune transmiserunt, ex impotentia muliebri dicet alter, alter vero ex jure gentium, ut optimum maximumque est;*”^(d) but I own that, with reference to the present case, I do not attach much importance to instances of this sort. The doctrine or fiction which has been expounded by some writers on the law of nations, under the name of extra-territoriality, (Martens, 46, Wheatley, 1273,) if it were carried out to its legitimate consequences, would, as it appears to me, render it highly dangerous for the Sovereign of any country to admit within his dominions any foreign Sovereign or even any ambassador of a foreign Sovereign. It is admitted, that the extent to which the doctrine should be carried out must be subject to great modifications, and I do not think that it affords any assistance in the practical consideration of the question, which are the exemptions or privileges which ought, by the law of nations, to be allowed to a foreign Sovereign temporarily resident within the dominions of another Prince.

“ ‘ Another argument for the defendant was, that a Sovereign coming from his own dominions into this country, attending the Court of the Queen, and sitting in Parliament, must be deemed to have come with the consent of the Queen, and to have been entitled to a safe conduct, which would have contained a prohibition to sue him in any Court; that therefore the defendant *ought to be deemed to have come and resided [*581] here on the faith of such right, which he is not the less entitled to, because the letters of safe conduct were not actually applied for and issued. This argument assumes that letters of safe conduct, such as might and lawfully ought to be issued at this time and on the occasion of such a visit as that made to this country by the King of Hanover, would have contained a prohibition to prosecute such a suit as this.

“ ‘ But the argument for the defendant, which appears to me to be the most important, was founded upon analogy to the immunities of ambassadors, recognized and declared to be in accordance with the law of England, by the statute of 7 Ann. c. 12. By that statute it was declared “ that all writs and processes sued forth or prosecuted, whereby the person of any ambassador of any foreign Prince authorized and received as such by Her Majesty, may be arrested or imprisoned, or his goods distrained, seized, or attached, shall be deemed to be utterly null and void ;” and after a penal clause affecting any person who may sue out any such writ or process, there is a proviso that no merchant or trader within the description of the statutes against bankrupts, who puts himself in the service of any ambassador, shall have or take any benefit by the act. It is argued that the law of nations and the law of the land having granted such immunities to ambassadors, the mere envoys and agents of Sovereign Princes, cannot have refused at least equal immunities to the Sovereigns

(c) Le Bel, Relation de la Mort de Mary de Monaldeschi, &c., Arch. Cur., 2 Ser. c. 8, 287.

(d) Bynk., Op., ii. 151.

themselves, on whose account the immunities to ambassadors were given. If it be right (as is universally admitted) that ambassadors should have such immunities, it must *à fortiori* be right that Princes should have them; and thus it is argued, that because ambassadors are held to be inviolable in the countries where they reside, Princes ought also to be so. But, on the part of the plaintiff, this is denied, and it is said that we must look at the reason of the law. An ambassador, who comes into a foreign State on the business of his Sovereign, which cannot be transacted without entire freedom and independence on his part, must be allowed privileges which are in no way required for the protection or accommodation of a Prince who comes on a visit of pleasure or compliment; and, moreover, that the immunity of an ambassador does not extend to every suit of every kind. There are exceptions depending on the peculiar liabilities or obligations of the person, or on the nature of the transaction, and it cannot be inferred that because an ambassador is in some or many cases exempt from suit, that therefore a foreign Prince is exempt from suit in all cases. The question upon the demurrer is to be determined by that which may be thought to be the law of nations applicable to the case; there is no English law applicable to the present subject unless it can be derived from the law of nations, which, when ascertained, is to be deemed part of the *common law of England. The law of nations includes all regulations which have been adopted by the common consent [*582] of nations, in cases where such common consent is evidenced by usage or custom. In cases where no usage or custom can be found, we are compelled (amidst doubts and difficulties of every kind) to decide in particular cases according to such light as may be afforded to us by natural reason, or the dictates of that which is thought to be the policy of the law: "*Lege deficiente, recurritur a consuetudinem, et deficiente consuetudine, recurritur ad rationem naturalem,*" and in the case now in question, it does not appear that there have been cases, or that events have occurred from which any usage or custom of nations can be collected.

"Bynkershoek, in his Treatise "*De Foro Legatorum,*" cap. iii. (Op. 2, 150,) discusses the very question which is now under consideration; he supposes a Sovereign Prince to pass into the dominions of another Prince, for any cause whatever of business or pleasure. It is not, he says, to be supposed that the Prince went there with the intent to put off his own sovereignty and become the subject of another; yet, what is to be done, if he commits violence or contracts debts in the country where he is? This, he says, will depend on the law of nations, adopted from reason and mutual consent, and established by usage. If we consult reason much is to be said on either side. If a Prince, in the dominion of another, becomes a robber, homicide, or conspirator, is he to escape with impunity? If he extorts money, or becomes indebted, is he to be permitted to carry home his plunder? It is, he says, difficult to admit that; and yet, on the other hand, is that which reason and the consent of all nations has granted to ambassadors, because they represent a Prince and obey his orders, to be refused to the Prince himself, perhaps transacting his own affairs? Is the sanctity of the Prince less than that of his ambassador? Shall we compel the Prince himself to answer when his

envoy is free? The learned writer, after in vain searching for precedent, proceeds thus:—"Nihil in hoc argumento proficiet rebus similiter à gentibus judicatis, atque ita sola superest ratio quem consulamus; et hac consultâ ego non ausim plus juris tribuere in principem non subditum quam in legatum non subditum. Quare ut extremum est in legato ut jubeatur imperio excedere, sic et in principe statuerem, si jus hospitii violet. In causâ æris alieni idem dixerim, nam arresto detinere principem, ut æs alienum expungat, quamvis fortè stricti juris ratio permetteret, non permittit tamen analogia ejus juris quod de legatis ubique gentium receptum est. Si neges ubi de jure gentium agitur ex analogiâ disputari posse, ego negaverim hanc quæstionem ex jure gentium expediri posse, cum exempla deficiant quibus consensus gentium probetur, nec quicquam adeo supersit, quam ut ad legatorum exemplum ipsos reges et [*583] principes, *et quidem magis, ab arresto dicamus immunes, et in eo à cæteris privatis differre."

"In a case where there is no precedent, no positive law, no evidence of the common consent of nations, no usage which can be relied on, where reasons important and plausible are arrayed in opposition to each other, and where no clear and decided preponderance is to be found, it seems reasonable to endeavour to borrow for our guidance some light, however feeble and uncertain, which may be afforded by analogous cases, from whence have been derived rules adopted with great, though not perfect uniformity, by all nations. It is true that a decision derived from principles supported by analogous cases alone, cannot be entirely satisfactory; and yet it may be the best, the most satisfactory, which the nature of the case admits of. It will be more satisfactory in proportion to the closeness of the analogy between the cases under consideration. It must be admitted, that all the reasons assigned for the immunity of ambassadors are not applicable to the case of Sovereign Princes; and it has been truly observed, that an ambassador, if exempt from the coercive power of the law in the country where he is, may, nevertheless, be compelled to submit to justice by his Prince in his own country; but that if you exonerate the Prince himself, justice fails altogether: but in ultimate effect the cases come very nearly to the same result. The Prince, not being subject to a foreign Power, may refuse to compel his ambassador to do justice, or may refuse to do the justice declared by a foreign tribunal, when requested by a foreign Power; and the refusal in either case becomes a ground of imputation against the Prince who refuses, and may give rise to those irritations which are so apt to prove incentives of war. Investigate the subject as we may, considerations of this sort press upon us. Whilst a prevailing respect for humanity and justice resides in the breasts of Princes, and when there is consent as to the means of ascertaining and promoting the ends of justice in particular cases, it is well; but in the last result of any enquiry on the subject we find that, in the absence of moral sanctions and of treaty, war and reprisals (*i. e.*, war again in a particular form) are the sanctions of that which is called the law of nations. If we hold foreign Princes to be amenable to the Courts of this country, the orders and decrees which may be made cannot be executed by the ordinary means—where is the power which can enforce

obedience? If accidental circumstances should give the power, and if, for the supposed purposes of justice an attempt were made to compel the obedience of a Sovereign Prince to any process, order, or judgment, he, and the nation of which he is the head, and probably all other Princes, and the nations of which they respectively are the heads, would see, in the attempt, nothing but a hostile aggression upon the inviolability *which all claim as the requisite of their Sovereign and national [*584] independence. On the other hand, if the jurisdiction of the Courts against Sovereign Princes be excluded, we are on the institution of a claim, very nearly, though not quite, in the state to which we are brought by the process, order, or judgment on the former supposition. The State may have to seek redress for the injured subject, and justice is to be requested from a person against whom you have no ordinary power to enforce it. It may be refused; acquiescence in the refusal is the abandonment of justice, and pressure after refusal implies an imputation, and gives rise to discussions and irritations which may again prove incentives to war. Justice can be peaceably and effectually administered and enforced there only where there is recognized authority and adequate power. What is to be done in cases where the authority is denied, where there is no power to enforce it?

“ ‘It must be admitted, that the subject is replete with difficulties. The difficulties of the subject, and the importance of maintaining the legal inviolability of Sovereign Princes, can scarcely be shown more strongly than by adverting to the opinions which have been expressed by eminent jurists, that offences committed by Sovereign Princes in foreign States ought rather to be treated as causes of war, than as violations of the law of the country where they are committed, and ought rather to be checked by vengeance, and making war on the offender, than by any attempt to obtain justice through lawful means. Zouch, “*Solutio Quæstionis*,” &c. (cap. iv. p. 66,) says, “*Ad id quod asseritur malè cum principibus actum iri, si in eorum territoriis, aliis principibus in eorum perniciem conjurandi licentia sit permittenda, respondetur quod talis licentia neutiquam est permittenda. Sed eos bello prosequi juri gentium consentaneum est; et si cum in territoria principis in quem conjurarunt deprehensi sunt, præsentis vindictæ uti melius videbitur; juri gentium convenit disfidare et pro hostibus declarare unde non expectato judicio cuivis eos interficere impune liceat.*” And Bynkershoek (Op. 2, 151,) says, “*Quid si enim, more latronis, invitam in bona in pudicitiam cujusque irruat, nec secus atque hostis captâ grassetur in urbe. Poterit utique detineri forte et occludi quamvis per turbam malim quam constitutio judicio.*”

“ ‘When great and eminent lawyers, men of experience and reflection, so express themselves as to show their opinion, that less mischief would ensue from the unrestrained and irregular vengeance of individuals and of the multitude, than from attempts to bring Sovereign Princes to judgment in the ordinary Courts of a foreign country where they have offended, however much we may lament that such should be the condition of the world, we may be sure of the sense which they entertain of the difficulty of making, and of the danger of attempting to make foreign Princes

[*585] *amenable to the Courts of Justice of the country in which they happen to be.

“ ‘After giving to the subject the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded, do not apply to the case of Sovereigns, but that there are reasons for the immunities of Sovereign Princes, at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors; that suits against Sovereign Princes of foreign countries must, in all ordinary cases in which orders or declarations of right may be sued, end in requests for justice, which might be made without any suit at all; that even the failure of justice, in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of Princes and nations, I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a Sovereign Prince resident in the dominions of another, is exempt from the jurisdiction of the Courts there.

“ ‘It is true, as was argued for the plaintiff, that the common interest of mankind requires that justice should everywhere be done, and that, for the attainment of justice, all persons should be amenable to the Courts of Justice. Such is the general rule; but in cases where either party has no superior by whom obedience can be compelled, where the execution of justice is not provided for by treaty, and cannot be enforced by the authority of the judge, and where an attempt to enforce it by the authority of the State may probably become a cause of war, the same common interest, which is the foundation of the rule, requires that some exception should be made to it, and that exception is the general rule with respect to Sovereign Princes. The question then arises, whether the exception in favour of Sovereign Princes, and the exemption from suit thereby allowed, is to be entire and universal, or subject to any and what limitations.

“ ‘The Act of Parliament relating to ambassadors, professes to be, and has (1 B. & C. 562,) frequently been adjudged to be declaratory, and in confirmation of the common law; and, as Lord Tenterden said, it must be construed according to the common law, of which the law of nations must be deemed a part. The statute does not in words apply to the case in which the ambassador might be a subject of the Crown of England, but there is an exception to that in the case of bankrupts in the service of ambassadors, and cases have frequently occurred in which an ambassador has himself been a subject of the sovereign to whom he was accredited; and notwithstanding some differences of opinion on the subject, it seems to be considered that such an ambassador would not enjoy a perfect immunity from legal process, but would have an immunity extending [*586] only to such things *as were connected with his office and ministry, and not to transactions and matters wholly distinct and independent of his office and its duties. Bynkershoek (Op. 2, 162,) thus expresses his opinion:—“*Legatum scilicet manere subditum ubi ante legationem fuit, atque adeo si contraxit aut deliquit subesse imperio cujus antea suberat; his autem consequens est nostros subditos, quamvis*

alterius principis legationem accipiant, subditos nostros esse non desinere neque forum quo semper usi sunt jure subfugere." And Vattel (book 4, c. 8, sec. 112,) says:—"It may happen that the minister of a foreign Power is a subject of the State where he is employed, and in this case, as a subject, he is unquestionably under the jurisdiction of the country in every thing which does not directly relate to his ministry." And after some discussion upon the question, how we are to determine in what cases the two characters of subject and foreign minister are united in the same person, Vattel adds, "Whatever inconveniences may attend the subjection of a minister to the Sovereign with whom he resides, if the foreign Prince chooses to acquiesce in such a state of things, and is content to have a minister on that footing, it is his own concern." And presuming from this view of what is considered to be the law of nations, that with respect to the immunity of an ambassador, who is a subject in the country of his residence, it must be distinguished what acts of his were connected with or required for the discharge of the duties of his ministry, and what were not; and that, with regard to acts connected with his ministry, the Courts (considering his character of ambassador) would hold him to be exempt from suit; but that, with regard to acts not connected with his ministry, the Courts (considering his character of subject) would hold him liable to suit. The enquiry is, whether in like manner, a Sovereign Prince, resident in the dominions of another Prince, whose subject he is, may not justly and reasonably be held free from suit in all matters connected with his sovereignty, and his rights, duties, and acts as Sovereign, and yet be held liable to suit in respect to all matters unconnected with his sovereignty, and arising wholly in the country to the Sovereign of which he is the subject.

"The first and most general is, that all persons should be amenable to the Courts of Justice, and should be liable to be sued. A consideration of the policy of the law creates an exception in the case of Sovereign Princes. May not a further consideration of the policy of the law create a modification or limitation of the exception in the case of Sovereign Princes who are subjects?

"There are in Europe other Sovereign Princes who, if not now, have been subjects of the country of their origin or adoption. Upon such a question as this, I cannot regard those cases, but they may have their specialties, of which I am not aware. I cannot venture to say, that a subject acquiring the character of *a Sovereign Prince in another country, and being recognized as a Sovereign Prince by the Sov- [*587] ereign of the country of his origin, may not by the act of recognition in ordinary cases, and by the laws of some countries, be altogether released from the allegiance and legal subjection which he previously owed; but this case must depend on its own circumstances, and I am of opinion, that it is not contrary to any principle, and not unreasonable to consider that, in the contemplation of the Courts of this country, the inviolability which belongs to His Majesty the King of Hanover, as a sovereign Prince, ought to be and is modified by his character and duties as a subject of the Queen of England.

"Previously to his becoming King of Hanover, he always lived in

allegiance to the Crown of England, and in subjection to the laws of England. His accession to the Throne of Hanover was contemporaneous with the accession of the Queen to the Throne of this kingdom, and since he became King of Hanover he has been so far from renouncing, or from showing any desire to renounce, his allegiance to the Crown or his subjection to the laws of England,—he has been so far from admitting it to be questionable, whether his sovereignty, and the recognition of it by the Queen, has absolved his allegiance or his subjection to the laws of England—that he has renewed his oath of allegiance, and taken his seat in the English Legislature, and has claimed and exercised the political rights of an English subject and an English Peer.

“ ‘If he came here as King of Hanover only, the same inviolability and privileges which are deemed to belong to all Sovereign Princes would have been his, and save in peculiar cases, such as I have before referred to, he would have been exempt from all suits and legal process. But coming here, not as King of Hanover only, but as a subject, as a Peer of the realm, and as a member of the Privy Council, can it be reasonably said that he is exempt from all jurisdiction, or, in other words, from all responsibility for his conduct in any of those characters?

“ ‘The law of England admits the legal inviolability of the Sovereign, requiring, at the same time, the legal responsibility of those who advise the Sovereign. Can the law of England, in any individual case, admit the strange anomaly of an inviolable adviser of an inviolable Sovereign, of a legal subjection without any legal superiority? Can any Peer or Privy Councillor, whatever station he may occupy elsewhere, be permitted to give advice, for which any other Peer, or any other member of the Privy-Council, might be justly impeached, and yet hold himself exempt from the jurisdiction of the highest tribunal in the realm? May he enter into a contract which any other subject would be compelled to perform, and yet refuse to answer any claim whatever, either for specific performance or damages?

[*588] “ ‘Great inconveniences may arise from the exercise of any jurisdiction in such a case. They arise, perhaps inevitably, from the two characters which His Majesty the King of Hanover unites in his own person, and from the claim which he voluntarily makes to enjoy or exercise concurrently in this country his rights as a Sovereign Prince, and also his rights as an English subject, Peer and Privy Councillor. He is a Sovereign Prince, and, as such, inviolable in his own dominions, and, I presume, also in the dominions of every other Prince to whom he is not a subject. Remaining in his own dominions, or in the dominions of any other Prince to whom he is not a subject, he would (as I presume) be exempt from all forensic jurisdiction. But he comes to this country, where he is a subject, and claims and exercises his rights as such. As a subject he owes duties correlative to which, not individuals only, but the country at large, may have legal rights, which are to be respected, and being legal rights, against a subject, in respect of his acts and duties as a subject, it seems that they ought, if necessary and practicable, to be vindicated and enforced by the law. Those legal rights would be nugatory if his inviolability as a Sovereign Prince would admit

of no exception or modification. But any contradiction or inconsistency may be obviated by distinguishing, as in the analogous case of the ambassador, the acts which ought to be attributed to one character or the other; and it appears to me that, when necessary, it must be the office and duty of the Courts to make the distinction.

“If the distinction can justly be made, why should it not? And why should not the jurisdiction be exercised so far as the circumstances of each case will allow? Admitting it to be a general rule, that Sovereign Princes are not liable to be sued, and that all Sovereign Princes may consider themselves interested to maintain the inviolability which each one claims, and that any aggression upon it might, in ordinary circumstances, be a cause of war; yet, observing what is stated to be the law of nations in the case of ambassadors, conceiving that to be a rule applicable only to the cases of Sovereigns who are subjects, and think fit actively to exercise their rights as subjects, it cannot have any extensive application, and is not likely to excite any general interest or any alarm, and having regard to that which is absolutely required to maintain the relation between Sovereign and subject in any country, I am of opinion that no complaint can justly, or will probably, arise from any legal proceeding, the object of which is to compel (as far as practicably may be) a Sovereign Prince residing in the territory of another Prince, whose subject he is, to perform the duties of a subject, in relation to his own acts done in the character of a subject only. And admitting that in ordinary cases it may happen that the execution of a decree cannot be enforced against a Sovereign Prince, though a subject *of this realm, I do not think, [*589] for that reason, that a plaintiff should be deprived of all means of establishing his right in a due course of procedure; nor do I think that I ought to presume that a Sovereign Prince, who deems it to be consistent with his dignity and interest to come here and practically exercise the rights of an English subject, will not also deem it consistent with his dignity and interest to yield willing obedience to the law of England, when duly declared. And for these reasons I am of opinion, that His Majesty the King of Hanover is and ought to be exempt from all liability of being sued in the Courts of this country, for any acts done by him as King of Hanover, or in his character of Sovereign Prince, but that, being a subject of the Queen, he is and ought to be liable to be sued in the Courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged as such subject. And in respect of any act done out of this realm, or any act as to which it may be doubtful whether it ought to be attributed to the character of Sovereign or to the character of subject, it appears to me, that it ought to be presumed to be attributable rather to the character of Sovereign than to the character of subject. And further, it appears to me, that in a suit in this Court against a Sovereign Prince, who is also a subject, the bill ought, upon the face of it, to show that the subject-matter of it constitutes a case in which a Sovereign Prince is liable to be sued as a subject. I cannot, therefore, consider the present suit as an ordinary suit between subject and subject; it is a suit against a defendant who is *primâ facie* entitled to special immunities; and it ought to appear on the bill that

the case made by it is a case to which the special immunities ought not to be extended. What is shown is, that the defendant is an English subject, and may therefore not be exempt from suit in some cases. Is it shown that this is one of the cases in which the defendant is liable to be sued?

“ ‘The object of the suit is to obtain an account of property belonging to the plaintiff, alleged to have been possessed by the defendant, under colour of an instrument creating a species of guardianship unknown to the law of England. It is not pretended that any one act was done, or that any one receipt, in respect of which the account is asked, was given in this country. Every act alleged as a ground of complaint was done abroad in Brunswick, in Hanover, or elsewhere in foreign countries. No act alleged as a ground of complaint was done by the defendant before he became King of Hanover; and from the nature of the transactions, and the recitals in the instrument, there are strong grounds to presume that it was only by reason of his being King of Hanover that the defendant was appointed guardian of the plaintiff’s fortune and property. It is not pretended that the instrument has been impeached, or attempted to be impeached, in the country where alone it has its locality and operation, [590] although it is alleged to be illegal there, and no reason is given why the plaintiff has not availed himself of that illegality to obtain relief from it. It is alleged to be null and void here; and upon this I may observe, that although, with regard to English instruments, intended to operate according to English law, the Court knowing the nature of the instrument, the relation between the parties to it, and the law applicable to the case, may be able, even on demurrer in a simple case, to adjudicate thereon upon a mere allegation that the instrument is null and void; yet that with regard to a foreign instrument, intended to operate according to a law not known in England, and which, as foreign law, is to be proved as a fact in the cause, an allegation that the instrument is void, is too vague.

“ ‘But passing that over, and considering the other matters which I have mentioned, and observing, that notwithstanding the allegation at the bar, that the instrument complained of is wholly independent of any political or State transaction, it is in the bill stated, as the sequel to a political revolution, which resulted in the deposition of a Sovereign Prince, and the appointment of a successor made under the authority of a decree of the Germanic Diet by the late King of Hanover and the reigning Duke of Brunswick; considering also that the instrument stated in the sequel of these political proceedings (which I must consider to be either wholly immaterial, or as introduced into the bill for the purpose of showing the character of the transactions in question,) is stated to have been executed also by the late King of Hanover and the reigning Duke of Brunswick; and considering, further, the objects for which the instrument is purported to have been executed, connecting those objects with the political transactions stated in the bill, and the transactions alleged to have taken place at Osterode in 1830, I should, if it were necessary for me to decide the question, be disposed to think that the instrument complained of is connected with political and State transactions, and is itself what in common

parlance is said to be a State document, and evidence of an act of State. But upon this occasion it is not necessary for me to give any opinion upon the question, whether the act complained of is or is not an act of State, or upon the question, which seems to have been raised in France, whether the Courts of a foreign country ought to take notice of such an instrument, for the purpose of enabling the guardian under its authority to possess the property and effects of the plaintiff in such foreign country; it is not even necessary for me to decide the question, whether, as against a subject only, this Court could have any jurisdiction to give relief in respect of acts done abroad, under such a foreign instrument as this.

“ ‘The question which I have had to consider is, whether, under the circumstances of this case, and as against a Sovereign Prince, who is a subject of the Queen of England, this Court has the *jurisdiction which is attributed to it by this bill. And I am of opinion that [*591] the alleged acts and transactions of the defendant under colour or under the authority of the instrument in question, are no acts and transactions in respect of which the defendant is liable to be sued in this Court, or in respect of which the Court has any jurisdiction over him. Let this demurrer, therefore, be allowed.’ ”

No. 6.

“DE HABER *v.* THE QUEEN OF PORTUGAL.”

“WADSWORTH *v.* THE QUEEN OF SPAIN.”

Argued before, and judgment given by, Lord Campbell, 28th May, 1851.

“*Prohibition—Foreign Sovereign—Immunity from Suit—Lord Mayor’s Court of London—Foreign Attachment—Time at which Defendant or Garnishee may apply for Prohibition—Necessity of Pleas to Jurisdiction—Application by a Stranger.*

DE HABER *v.* THE QUEEN OF PORTUGAL.(d)

“No English Court has jurisdiction to entertain an action against a foreign Sovereign for anything done, or omitted to be done, by him, in his public capacity as representative of the nation of which he is at the head.

“Where the Lord Mayor’s Court of London has no jurisdiction over the person of the defendant against whom a plaint has been entered in that Court, the awarding process of foreign attachment against a person having funds in his hands belonging to the defendant, as a means of compelling an appearance, is an excess of jurisdiction, for which prohibition will lie.

“Where, therefore, a plaint was entered in the Lord Mayor’s Court against the Queen of Portugal, ‘as reigning Sovereign and supreme head of the nation of Portugal,’ to recover a debt alleged to be due from the Portuguese Government, and a foreign attachment had issued, according to the custom of the city of London, the Court made absolute a rule for a prohibition to restrain proceedings in the action and in the attachment.

“The same principle was applied to a case where a plaint was entered in the Lord Mayor’s Court against the Queen of Spain, not expressly as reigning Sovereign, and head of the Spanish nation, but where it appeared by affidavit that the plaintiff’s sole cause of action arose upon a Spanish Government bond, purporting to

have been issued under a decree of the Cortes, sanctioned by the Regent of Spain, in the name of the Queen, then a minor.

- "The writ of prohibition may in such cases be granted on the application of the Queen (the defendant) before she has appeared to the action in the Lord Mayor's Court; or on the application of the garnishee, either before or after he has pleaded *nil debet*.
- "Where an inferior Court has no jurisdiction to entertain a suit, it is not necessary to entitle a party to a prohibition, that he should have there pleaded to the jurisdiction, and that the plea should have been overruled.
- "The Court is bound to grant a prohibition where a Court has no jurisdiction, upon the application of a stranger as well as of a party to the proceedings.
- "The process of foreign attachment can only be resorted to where the cause of action against the original defendant arises within the jurisdiction of the Court from which the attachment issues."

"THIS was a rule obtained on behalf of the Queen of Portugal, calling upon the Mayor and Aldermen of the City of London, and the above plaintiff, to show cause why a writ of prohibition should not issue to the Lord Mayor's Court of London to prohibit the said Court from holding plea or further proceeding in an action entered in the said Court by the said plaintiff against 'Her Most Faithful Majesty Donna Maria da Gloria, Queen of Portugal, therein described as reigning Sovereign and supreme head of the nation of Portugal,' and from further proceeding with [*592] *two foreign attachments issued out of the said Court in the said action, and made in the hands of Senhor Xavier de Brito and others and to restrain the said plaintiff De Haber from further proceeding with the same.

"It appeared by the affidavits upon which the rule was founded, that, on the 28th March last, the said plaintiff De Haber entered an action in the said Mayor's Court of London, against 'Her Most Faithful Majesty Donna Maria da Gloria, Queen of Portugal, as reigning Sovereign and as supreme head of the nation of Portugal,' and upon the same day issued an attachment in the said Mayor's Court against the moneys, goods, and effects which then were or which thereafter should come into the hands or custody of Senhor Xavier de Brito, belonging to Her said Most Faithful Majesty Donna Maria da Gloria, as reigning Sovereign and as supreme head of the nation of Portugal, upon an affidavit of the said M. de Haber, which stated 'That Her Most Faithful Majesty Donna Maria da Gloria, Queen of Portugal, as reigning Sovereign and as supreme head of the nation of Portugal, is justly and truly indebted to him, this deponent, in the sum of 12,136*l*. for money had and received by Her said Majesty Donna Maria da Gloria, Queen of Portugal, for and on behalf of the said nation of Portugal, for the use of this deponent, and for money taken by Her said Majesty Donna Maria da Gloria, Queen of Portugal, by and on behalf of the said nation of Portugal, from this deponent's banker, with interest thereon.'

"The defendant (the Queen of Portugal) being duly summoned according to the the custom of the city of London, did not appear to the above action.

"The notice of attachment, which was served in the said attachment upon the said Xavier de Brito by the serjeant-at-mace stated, 'That by virtue of an action entered in the Lord Mayor's Court, London, against Her Most Faithful Majesty Donna Maria da Gloria, Queen of Portugal,

as reigning Sovereign and as supreme head of the nation of Portugal, defendant, at the suit of M. de Haber, plaintiff, in a plea of debt upon demand of 24,000*l.*, I do attach all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid, and that you are not to part with such moneys, goods, or effects, without license of the said Court.'

"It was further stated that the claim of the plaintiff against Her said Most Faithful Majesty (if any) was for money equivalent to the said sum of 12,136*l.*, which the said plaintiff alleged that he had in the hands of one Francisco Ferreira, of Lisbon, banker, at the period when Don Miguel was driven out of Portugal, and which was by the said F. Ferreira paid over to the Government of Portugal under the decree of some Court in Portugal, and such cause of action (if any there be) in the said action and attachment *arose in the Kingdom of Portugal aforesaid, and not [*593] within the city of London.

"On the same 28th day of March last, the said plaintiff, upon the same affidavit, issued another attachment in the said Mayor's Court against the moneys, goods, and effects which then were or which thereafter should come into the hands or custody of William Christy and others, being the trustees of the London Joint Stock Bank, belonging to Her said Most Faithful Majesty Donna Maria da Gloria, as reigning Sovereign and as supreme head of the nation of Portugal. The notice of attachment which was served in the last-mentioned attachment was in terms similar to the one served on the other garnishee. None of the garnishees had pleaded to the attachment.

"It also appeared that the plaintiff had previously issued another plaint in the Mayor's Court for the same debt against 'Her Most Faithful Majesty Donna Maria da Gloria, Queen of Portugal,' and also two attachments against the same garnishees, who had pleaded *nil habet*, and upon the trial before the recorder those issues had been found for the garnishees, on the ground that the funds in their hands belonged to the Queen of Portugal in her sovereign capacity.

"JUDGMENT.

"Lord Campbell, C. J.—'We are of opinion that the rule for a prohibition in this case ought to be made absolute. The plaintiff has commenced an action of debt, in the Court of the Lord Mayor of London, against Her Majesty Donna Maria da Gloria, Queen of Portugal, as reigning Sovereign and as supreme head of the nation of Portugal, and by an affidavit laid before us it appears that the plaintiff's alleged cause of action is in respect of a sum of Portuguese money, equivalent to 12,136*l.* sterling, which he had in the hands of one Francisco Ferreira, of Lisbon, banker, at the period when Don Miguel, pretending to the Crown of Portugal, was driven out of that country, and which was by the said Francisco Ferreira paid over to the Portuguese Government, now represented by the royal defendant. The plaintiff, having entered his plaint, proceeded, according to the custom of foreign attachment in the city of London, as if the defendant were subject to the jurisdiction of the Lord Mayor's

Court and the cause of action had arisen within that jurisdiction, and he sued out a summons for the defendant "to appear and answer the plaintiff in the plea aforesaid." A return being made by the serjeant-at-mace "that the said defendant had nothing within the said city or liberties thereof whereby she can be summoned, nor was to be found within the same," the plaintiff swore an affidavit, in which he stated that the defendant, "as reigning Sovereign and as supreme head of the nation of Portugal, is justly and truly indebted in him in the sum of 12,136*l.*, for money had and received *by Her said Majesty Donna Maria da Gloria, [*594] Queen of Portugal, for and on behalf of the said nation of Portugal, for his use, and for money taken by Her said Majesty Donna Maria da Gloria, Queen of Portugal, by and on behalf of the said nation of Portugal from this deponent's banker, with interest thereon." The defendant being solemnly called, and not appearing before the Lord Mayor, the plaintiff alleged by his attorney, "that Senhor Guillieme Candida Xavier de Brito, of the city of London, the garnishee, had money, goods, and effects of the defendant in his hands, and prayed process according to the said custom, to attach the said defendant by the said money, goods, and effects, in the hands of the garnishee as aforesaid, so that the defendant may appear in the said Lord Mayor's Court to answer the plaintiff in the plea aforesaid." Thereupon the judge presiding in that Court awarded an attachment against the defendant as prayed, directed to the serjeant-at-mace, which that officer immediately executed, leaving with the garnishee a notice in the terms following:—"Senhor Guillieme Candida Xavier de Brito. March 28th, 1851. Take notice, that by virtue of an action entered in the Lord Mayor's Court, London, against Her Most Faithful Majesty Donna Maria da Gloria, Queen of Portugal, as reigning Sovereign and as supreme head of the nation of Portugal, defendant, at the suit of Maurice de Haber, plaintiff, in a plea of debt upon demand of 24,000*l.*, I do attach all such moneys, goods, and effect as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid, and that you are not to part with such moneys, goods, or effects without license of the said Court."

"On the second day of Easter Term this rule for a prohibition was applied for and obtained on behalf of the Queen of Portugal, cause being shown against this rule, and a similar rule in a similar action brought against Her Most Faithful Majesty the Queen of Spain. Various questions respecting foreign attachments were discussed, which we do not feel it necessary to determine, as we think that upon simple and clear grounds there has been an excess of jurisdiction by the Court of the Lord Mayor of London, against which we are bound to grant a prohibition at the prayer of the defendant. In the first place it is quite certain, upon general principles, that upon the authority of the case of "*The Duke of Brunswick v. The King of Hanover*," recently decided in the House of Lords, that an action cannot be maintained in any English Court against a foreign potentate for any thing done, or omitted to be done, by him in his public capacity as representative of the nation of which he is the head, and that no English Court has jurisdiction to entertain any com-

plaint against him in that capacity. Redress affecting a British subject is to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances, or acts of *the British Government. To cite a foreign potentate in a municipal Court for any complaint against him in his public [*595] capacity, is contrary to the law of nations, and an insult which he is entitled to resent.

“The statute of 7 Anne, c. 12, passed on the arrest of the Russian Ambassador, to appease the Czar, has always been said to be merely declaratory of the law of nations, recognised and enforced by our municipal law, and it provides, “that all process whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void.” On the occasion of the outrage which gave rise to that statute, Lord Holt was present as a privy-councillor to advise the Government as to the fit steps to be taken, and with his sanction seventeen persons, who had been concerned in arresting the ambassador, were committed to prison, that they might be prosecuted by information at the suit of the Attorney-General. Can we doubt that, in the opinion of that great judge, the Sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represented him?

“Let us see, then, what has been done by the Lord Mayor of London. On a plaint being entered in his Court against Donna Maria da Gloria, as reigning Sovereign and supreme head of the nation of Portugal, for what she had done for and on behalf of the said nation, he summoned her to appear before him, and she being solemnly called and making default, he, with full knowledge that she was so sued, issues an attachment against her for this default, to compel her to appear; under this attachment all her moneys, goods, and effects within the city and liberties of London are ordered to be seized; if she does not obey the mandate within a year and a day these funds are to be confiscated, or applied to the satisfaction of the plaintiff's demand, without any proof of its being justly due, and she can only get rid of the attachment by giving bail to pay the sum which the plaintiff may recover, or to render herself to prison that she may be committed to the Poultry or Giltspur-street Compter. The attachment applies not only to all the moneys, goods, and effects of the Queen of Portugal then in the hands of the garnishee, but to all that shall thereafter come into his hands or custody. The process is studiously framed to be applicable to the property of the Queen “as supreme head of the Portuguese nation.” It appears from the affidavit that the plaintiff had entered a former plaint against the Queen of Portugal, which he suggested was against her in her individual capacity: that upon an attachment the garnishee pleaded *nil habet*, and that upon this issue the jury found a verdict for the garnishee, because all the funds in the hands of the garnishee were proved to belong to the defendant in her public capacity, as Sovereign of the dominions which she governs. *Were the garnishee now to plead *nil habet*, the verdict must be against him, for the funds which he holds belong [*596] to the defendant in the capacity in which she is sued. While this attach-

ment stands, should any money raised by loan, or any munitions of war purchased for the use of the Portuguese Government, be found within the city of London or the liberties thereof, they are all liable to be seized for the benefit of the plaintiff.

“It may be right that we should mention two authorities which we have met with in our researches upon this subject, although they were not referred to in the argument, as they seem at variance with the opinion we have formed. Bynkershoek, in his treatise “*De Foro Legatorum*,” cap. iv., discussing the question whether the goods of a Sovereign Power in a foreign State are liable to be judicially arrested or attached, says, “*In causâ civili, cum id inter privatos obtineat, ubicumque arresta frequentantur, ego nullus animadverto, cur non idem obtinere oporteat quod ad bona externorum Principum. Si ab arresto Principis temperemus ob sanctitatem personæ, quis bona Principis in alieno Imperio aequæ sancta esse dixerit? Usu gentium invaluit ut bona quæ Princeps in alterius ditione sibi comparavit, sive hæreditatis, vel quo alio titulo acquisivit, perinde habeantur, ac bona privatorum, nec minus quam hæc, subjiciantur oneribus et tributis.*” But this author, who is well known to have an antipathy to crowned heads and to monarchical government, admits that other jurists differ from him, and he goes on to cite a decision in his own country which completely overturns his doctrine. “In the year 1668, certain private creditors of the King of Spain arrested three ships of war of that kingdom, which had entered the port of Flushing, that the pursuers might thus obtain satisfaction for their debt; the King of Spain being cited to appear at a certain day before the judges of the Court of Flushing; but upon the remonstrance of the Spanish ambassador, the States-General, by a decree of the 12th of December, 1668, ordered the authorities in the province of Zealand to liberate the Spanish ships of war, and to allow them freely to depart, at the same time directing a representation to be made to the Spanish Government to do justice to the Dutch citizens, lest it should be necessary to resort to reprisals;” and there can be no doubt that, according to the law of nations, “reprisals” would be the appropriate remedy, not a judicial citation before a municipal Court, to be enforced by seizure of national property.

“In Selden’s “*Table Talk*,” (Singer’s ed., p. 108,) there are the following words, supposed to be spoken by that profound lawyer himself: “The King of Spain was outlawed in Westminster Hall, I being of counsel against him. A merchant had recovered costs against him in a suit, which, because he could not get, we advised to have him outlawed for not appearing, and so he was. As soon as Gondimar heard that, he presently sent *the money, by reason if his master had been outlawed he [597] could not have the benefit of the law, which would have been prejudicial, there being then many suits depending betwixt the King of Spain and our English merchants.” The fact here stated seems to have been credited by Lord Chancellor Thurlow, who, in the case of *The Nabob of the Carnatic v. The East India Company*,^(e) observed, “that the King of Spain had been once outlawed by Selden’s advice, to prevent

(e) 1 Ves. Jun. 386.

him from taking advantage of his suit," but he adds, "the outlawry was bad enough." Others have doubted whether the King of Spain ever was outlawed in the manner supposed. Legge, in his "Treatise on Outlawry," p. 12, alluding to it, says, "This was a very strange case, if for costs only, as it does not seem warrantable by law."

"Such an extract from an amusing book of anecdotes cannot be considered any authority for the position that a Sovereign Prince may be sued as such in our municipal Courts, and that property belonging to him in his public capacity may be seized to compel an appearance. The statement is in no way authenticated by Selden himself, and is merely a loose report of what is supposed to have fallen from him in conversation. It cannot be accurate, as the outlawry is, first, supposed to have been for non-payment of costs; and, secondly, for not appearing; and, according to the usual practice, it could not have been in Westminster-hall. We have caused search to be made for the record, but it is not forthcoming. There may, *de facto*, be judgment of outlawry against any Sovereign Prince who does not appear after being proclaimed the requisite number of times at the County Court or Court of Hustings, no inquiry being made whether the defendant be an alien or a native-born Englishman, an emperor or a peasant; but this proceeding is clearly irregular, and all concerned in it would be liable to punishment. Till the statute of 2 Will. IV. c. 39, there could have been no outlawry except upon a *capias*, which could not lawfully be sued out against a Peer or member of the House of Commons, much less against a Sovereign Prince. After outlawry the outlawed is to be seized wherever he can be found, and imprisoned in *salvâ et arctâ custodiâ*, all his personal property is forfeited to the Queen of England, and she is entitled to the profits of all his lands. Such a proceeding is manifestly inapplicable to a foreign Sovereign, who must be supposed to be in his own dominions, and if he were in England could not be so sued without a breach of the law of nations and of our municipal law. The suits alleged to have been pending between the King of Spain and the English merchants, if there were any, were probably actions brought by him on bills of exchange, or arising out of some of the commercial transactions *in which His Majesty was then engaged. For such matters a foreign [598] Sovereign might and may still sue in our Courts of Justice; but no authority can be found for his being sued here as a Sovereign.

"In the case of "The Prince Frederick," before Lord Stowell, as Judge of the Admiralty, the same view of the subject was taken by that greatest of jurists, although, from a compromise, no formal judgment was pronounced. There, a Dutch ship of war had been saved from shipwreck by English sailors, who libelled her for the salvage. Objection being made that the Court had no jurisdiction, a distinction was attempted that the salvors were not suing the King of the Netherlands, and that, being in possession of and having a lien upon a ship which they had saved, the proceeding might be considered *in rem*. But Lord Stowell saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused a representation to be made on the subject to the Dutch

Government, who very honourably consented to his disposing of the matter as an arbitrator. The case of "The Prince Frederick" is not in print, but we have had an account of it from the Queen's Advocate.

"Notwithstanding the dictum by Bynkershoek, and the outlawry of the King of Spain, supposed to be related by Selden, we cannot doubt that the awarding of the attachment in the present case by the Lord Mayor's Court was an excess of jurisdiction, on the ground that the defendant is sued as a foreign potentate. Therefore, the circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court need not be relied upon. Nevertheless, after the strong assertions at the bar that this is immaterial where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the Court from which it issues. The garnishee is safe by paying under the judgment of the Court; but the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail. No agreement of counsel to abstain from making the objection can alter the law of the land, which says, that an inferior Court can only hold plea where the cause of action arises within the local limits to which its jurisdiction by character or custom is confined.

"We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal, before she appears in the Lord Mayor's Court. The plaintiff's counsel argue that before she can be heard she must appear and put in bail in the alternative, to pay or to render. It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her which [*599] would be a further indignity, *and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority, that where the Court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger as well as of the defendant himself. (2 Inst. 607, Com. Dig. title "Prohibition," E.) The reason is, that where an inferior Court exceeds its jurisdiction, it is chargeable with a contempt of the Crown as well as a grievance to the party. (Ede v. Jackson.) Therefore this Court, invested with the power of preventing all inferior Courts from exceeding their jurisdiction, to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction. What has been done in this case by the Lord Mayor's Court must be considered as peculiarly in contempt of the Crown; it being an insult to an independent Sovereign, giving that Sovereign just cause of complaint to the British Government, and having a tendency to bring about a misunderstanding between our own gracious Sovereign and her ally, the Queen of Portugal. Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved or as a stranger, we think we are bound to correct the excess of

jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.' "Rule absolute."

No. 7.

"WADSWORTH V. THE QUEEN OF SPAIN." (f)

"IN this case a similar rule (to that obtained in 'De Haber v. the Queen of Portugal') for a prohibition had been obtained on behalf of the garnishees. The following were the material facts :—The plaintiff Wadsworth, on the 30th December, 1850, filed an affidavit in the Lord Mayor's Court to the effect that the Queen of Spain was justly and truly indebted to him in 10,000*l.*, for interest upon certain bonds or certificates, dated the 10th of December, 1834, and made and entered into by, or on behalf of Her Majesty the Queen Regent of Spain, in the name of her daughter Doña Isabel Segunda, Queen of Spain, by virtue of the law decreed by the Cortes, and sanctioned by Her said Majesty the Queen Regent, in the name of her said daughter, and of the Treaty between the Minister Secretary of State for the Finance Department of Spain, and M. Ardouin, banker, of Paris, and [*600] *which said interest was due and payable on certain days then past. The plaintiff entered his plaint in the Lord Mayor's Court, alleging that the Queen of Spain, 'at the parish of, &c., and within the jurisdiction of that Court,' agreed to pay to the plaintiff 2000*l.* Proceedings were thereupon taken according to the practice of that Court, and notices of foreign attachment were served upon Ivaquin Scheidnagel, and Messrs. Martin, Stone & Co., bankers, as garnishees, attaching certain moneys of the defendant in their hands. The garnishees, thereupon, pleaded *nil habet* to the said attachments, upon which issue had been joined. The Queen of Spain had never appeared in the Mayor's Court. The bonds, which were issued and signed by Messrs. Ricardo, as agents to the Queen of Spain within the city of London, were in the following form :—

"Public debt of Spain.—The bearer of this certificate is entitled to an annuity of 10 hard dollars, equivalent to 54 francs, at 2*l.* 2*s.* 6*d.* sterling, representing a capital of 200 hard dollars, 1,080 francs, or 42*l.* 10*s.*, sterling, by virtue of the law decreed by the Cortes, and sanctioned by Her Majesty the Queen Regent of Spain, in the name of her august daughter Doña Isabel II., the 16th of November, 1834, and of the Treaty concluded between the Minister Secretary of State for the Finance Department and M. Ardouin, banker, of Paris, the 6th December, of the same year. The said annuity will be payable in Madrid, Paris, or London, at the option of the bearer, half yearly, on the 1st of May and the 1st of November in each year, on presentation of the dividend warrant then due; in Paris at the rate of 5 francs 40 cents per hard dollar, and in London at 4*s.* 3*d.* sterling, also per hard dollar. The bearer has the option of causing this certificate to be definitely con-

verted into an extract of inscription payable at Madrid. To this certificate are annexed 40 dividend warrants. If at the end of twenty years it should not have been withdrawn from circulation, either by means of redemption or of conversion into an extract of inscription, forty new dividend-warrants shall be delivered on the presentation of this certificate with the dividend warrants preceding that which latest became due.'—(Signed by the Secretary of State for the Finance Department.)

"The dividend-warrants or coupons annexed, were in the following form:—

"'Dividend-warrant for 6*l.* 7*s.* 6*d.* sterling, payable on the 1st of May, 1841, at the office of Messrs. I. & S. Ricardo & Co., London. 6*l.* 7*s.* 6*d.*

"The affidavit in support of the rule stated that Ivaquin Schiednagel, one of the garnishees, was president of a commission appointed by the Spanish Government for the management in England of the affairs relative to the public debt of Spain, and for facilitating the payment of dividends to the holders, in England, of bonds or other public securities, and that as such president he received from time to time remittances [601] from Spain, for the purpose of *paying the half-yearly coupons of such bonds. That none of the said garnishees had in their possession or power any moneys, &c., of the Queen of Spain, as her private property, and unconnected with the Government of her kingdom, and that the said Doña Isabel was and still is reigning Sovereign of Spain, and as such entitled to all rights and prerogatives appertaining to such sovereignty. That the said bonds were made by the Queen Regent, in her sovereign character only, and solely on account of the Kingdom of Spain, and as an act of State in the government thereof, and not for or in respect of any private or personal debt owing by her, or by the Queen of Spain, to the above plaintiff; and that the said Queen of Spain was, at the time of the commencement of the said action, and still is domiciled in Spain, owing no allegiance to Her Majesty Queen Victoria.

"JUDGMENT.(g)

"Lord Campbell, C. J.—'This case nearly resembles that (*De Haber v. the Queen of Portugal*) in which we have just given judgment, but differs from it in two particulars. First, here the plaintiff's affidavit does not expressly state that the action is brought against the defendant, as reigning Sovereign, and supreme head of the Spanish nation; and, secondly, the party applying is the garnishee, after pleading *nil habet*.

"'The effect of the first difference is entirely done away with by the disclosure the plaintiff makes in the affidavit of his supposed cause of action, which is on a written instrument, commonly called a Spanish Government bond, in the form of a debenture, entitled "*Public debt of Spain*," signed by an officer of the Government of Spain, as contractor, and purporting to have been issued under a decree of the Cortes sanctioned by the Regent of Spain in the name of her daughter, the present

Queen, then a minor. It is quite clear that no one could pretend, upon such an instrument, to bring an action against the Queen of Spain, as a private individual, supposing that she could be sued in the Lord Mayor's Court for a debt contracted by her in London in her private capacity, she having, by the constitutional laws of Spain, private property which would be answerable for such a debt. There is here, therefore, an equal want of jurisdiction in the Lord Mayor's Court to entertain the suit or to summon the defendant. Nevertheless, the Lord Mayor did entertain the suit, summoned the defendant, and, upon her making default in appearing before him, with full knowledge of the alleged cause of action, awarded an attachment against her, under which money due to her in her public capacity of Sovereign of Spain, was liable to be seized.

“ ‘There is in this case, therefore, the same palpable excess of jurisdiction pointed out in the case of the Queen of Portugal.

*“ ‘We have only to consider whether there is before us a proper party to pray for a prohibition. The Queen of Spain [*602] does not make the complaint, and it is only made by the garnishee after pleading *nil habet*.

“ ‘The plaintiff's counsel argue that the garnishee could only plead *nil habet*; that if the Queen of Spain has any privilege against being sued in the Courts of this country, she only can take advantage of it; that she ought to have appeared and pleaded to the jurisdiction; that by her non-appearance she must be considered as having waived her privilege; that there has been no excess of jurisdiction, at any rate as far as the garnishee is concerned; that it must be presumed that the Lord Mayor's Court will do its duty, and that if it decide improperly, the remedy is a writ of error, by which the record may finally be brought into this Court. But we are clearly of opinion, that in a case of this sort, if the garnishee comes in time, he may be heard in this Court, and a prohibition may be granted at his instance. Here there neither was nor could be any personal summons; the defendant could not be required to appear without a breach of the law of nations. The plea to the jurisdiction could only have been pleaded by her in her proper person. The garnishee has an interest in setting aside an attachment improperly executed, if he has funds of the defendant in his hands, for, although he would be discharged according to the law of this country, by payment under the judgment of the Lord Mayor's Court, the law of Spain may not recognise such a payment; he is prevented from applying the funds in payment of a debt which may afterwards become due to himself from the Spanish Government; and at all events he is “a stranger,” on whose information and complaint of the excess of jurisdiction in contempt of the Crown, we should be bound to correct it by a prohibition. If the record fully discloses the error into which the inferior Court has fallen after there has been an excess of jurisdiction, a prohibition, and not a writ of error, is the appropriate remedy.

“ ‘Has the garnishee, then, by pleading *nil habet*, disqualified himself from coming before us to pray for the prohibition? We think not. He was bound to put in a plea that he might avoid judgment; and before the trial of the issue upon that plea, and within a reasonable time after

pleading it, he applies for a prohibition to prevent further proceedings in an action which ought never to have been commenced. *Hoc statu*, a stranger might successfully apply for a prohibition, and surely so may the garnishee. To show that a prohibition could not be applied for till the objection relied on was specifically made in the inferior Court and overruled, the plaintiff's counsel mainly relied upon the two cases of *Home v. Lord Camden*, and *Chesterton v. Farlar*. In the former case, it was held by the House of Lords, in conformity with the advice of all [*603] the judges, that whether the misinterpretation *by an inferior Court of a statute, the consideration of which is confessed to be within its jurisdiction, be a ground for a prohibition, or be not rather a matter of appeal, in such a case a prohibition will not lie unless it be made to appear to the superior Court, that the party applying for the prohibition has, in the inferior Court, alleged the grounds for a contrary interpretation of the statute on which he applies for the prohibition, and that the inferior Court has proceeded notwithstanding such allegation.

“ ‘But the opinion of the judges, delivered by Lord Chief Justice Eyre, on which the House acted, was founded entirely upon the reason that the inferior Court (the Commissioners of Prizes) had committed no excess of jurisdiction, and, therefore, that a misconstruction of the Act of Parliament was rather the subject of an appeal than of a prohibition. He says “the complaint made to the Temporal Court is not that the sentence is wrong, which indeed the Temporal Court had no jurisdiction to correct if it were wrong, nor is the complaint that the sentence was an excess of jurisdiction, or in any other respect a ground for prohibiting the Prize Court to carry it into execution.

“ ‘In *Chesterton v. Farlar*, a party who had appealed from the Arches Court to the Queen in Council, the appeal being referred by her to the Judicial Committee, while the appeal was pending, and before any proceeding had been taken in that Court, moved the Court of Queen's Bench for a prohibition, on the ground that a church-rate, on which the suit had been commenced in the Consistory Court, was bad, as appeared by the pleadings there. The Court of Queen's Bench (I think very properly) held that a prohibition could not be granted on this ground, the cause being before a Court the jurisdiction of which was not denied, no erroneous proceeding having been taken there, and this Court refusing to presume that the Judicial Committee would act incorrectly. Lord Denman having pointed out that the Court before which the cause then was had jurisdiction over it, and had not fallen into any mistake, adds, “if in the progress of the cause, the Court should commit any error, if they do anything against common law or Acts of Parliament, we may then interfere.” But in the case at bar, the inferior Court had no jurisdiction to entertain the cause; and before the prohibition was applied for, the inferior Court had committed a manifest error, and had clearly exceeded its jurisdiction by summoning the Queen of Spain, and issuing an attachment against her.

“ ‘Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable cus-

tom of foreign attachment in the city of London, and in violation of the universal law by which all civilized nations are bound. It gives us great satisfaction, therefore, to be able, consistently with the decisions of our predecessors, and the *principles by which they have been guided, [*604] to grant the relief which is prayed. If we had entertained any grave doubt upon the subject, we should have directed the applicant to declare in prohibition; but being clearly of opinion that there is an excess of jurisdiction in the Court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute.'

"Rule absolute."

No. 8.

DECISIONS IN THE FRENCH COURTS.

Tribunal Du Hâvre.

(Correspondence Particulière.)

Audiences des 10, 23, et 25 Mai.

AFFAIRE DE M^E BLANCHET, AVOCAT, CONTRE LE PRÉSIDENT DE LA REPUBLIQUE D'HAÏTI. (h)

"A L'AUDIENCE du 10, M^e Blanchet a répliqué. Après de nouveaux détails sur l'importance et l'étendue de ses travaux, il continue ainsi :—

" 'Vous avez été payé, m'a-t-on dit ! Il est vrai que la commission instituée par le président Boyer a fait un savant calcul d'économie politique, pour établir que j'avais trop reçu, puisque la somme qui lui avait été payée avait été supérieure au traitement des membres du corps législatif ; mais cette décision inspirée par le président Boyer est ridicule.'

"Dans la consultation de M^e Isambert, on a fait un autre argument. Voyez l'injustice de M^e Blanchet ; il accuse le président d'être ingrat, de ne pas récompenser les travaux qu'il a demandés ; et il a donné 10,000 franc pour l'infortune des hommes de couleur, sans qu'aucune demande lui ait été adressée. M^e Blanchet répond *nemo liberalis nisi liberatus*. M^e Isambert sait mieux que personne que je n'ai pas été payé ; il en a la conviction. (M^e Isambert fait un geste négatif.) M^e Blanchet lit alors un passage d'une lettre de cet avocat du 10 Décembre, 1826, où il est dit qu'il s'interposera pour que M^e Blanchet soit traité honorablement. Donc à cette époque M^e Isambert pensait que M^e Blanchet n'avait pas été convenablement rétribué. Il est vrai qu'il peut avoir deux consciences, l'une comme homme privé, l'autre comme jurisconsulte et homme public.

"M^e Isambert se lève et demande que M^e Blanchet soit tenu de lire la lettre toute entière, afin qu'il n'en altère pas les dispositions *comme il l'a fait pour les documens lus à l'audience du 3 Mai, [*605] qu'il a positivement refusé de communiquer.

“ M^e Blanchet lit la lettre ainsi conçue :—

“ ‘ Mon cher confrère.—Je ne puis vous communiquer les pièces que vous me demandez par votre billet d’heir ; elles ont été destinées au président seul et au ministre des affaires étrangères, où l’on poursuit l’affaire diplomatiquement. Elles ne m’appartiennent pas, et ne doivent pas voir le jour. Si le conflit est élevé, vous aurez tous vos moyens de défense.

“ ‘ Je vous dirai seulement qu’on a été prodigieusement étonné que vous ayez appelé le sieur Jean-Pierre Boyer devant les Tribunaux, tant comme particulier que comme président d’un état souverain, pour un travail confidentiel que l’on dit vous avoir été confié sur les lieux, et que vous ayez obtenu d’un juge du Hâvre la permission de saisir des propriétés d’un gouvernement sur un simple exposé.

“ ‘ Je crains tellement le débat public pour la cause que nous défendons tous, qu’en trouvant mal fondée, en la forme, la demande dont vous avez saisi le Tribunal du Hâvre, j’ai désiré un arbitrage.

“ ‘ Le président paraît fort piqué contre vous ; vous l’êtes contre lui. Un débat de cette nature ne peut qu’être affligeant, comme vous le disait M. le général Roche, dans mon cabinet.

“ ‘ Mon vif désir est que vous soyez traité honorablement de vos travaux. J’ai parlé, il y a long-temps, de ma manière de voir à ce sujet, à M. D——, notre ami commun. J’accueillerai avec le plus grand plaisir, et je m’empresserai d’appuyer de toutes mes forces les demandes, qui auront pour but d’arriver à une conclusion agréable aux deux parties.’

“ M^e Blanchet arrive à la question de compétence. Il reproduit et développe ses argumens pour prouver qu’il est né et qu’il est resté Français. Il serait Français quand même il serait né sur le territoire d’Haïti, depuis la reconnaissance d’indépendance, et quoique son père ait été l’un des auteurs de la constitution, et l’un des fondateurs de cette indépendance. La preuve que la France l’a considéré comme tel, c’est qu’elle l’a fait élever à ses frais, bien que Haïti se fût séparé de la mère-patrie.

“ M^e Blanchet se trouvait exclu comme blanc de la naturalité Haïtienne ; mais, a-t-on dit, n’êtes-vous pas un homme de couleur ? (i)

“ Quoiqu’il soit évident qu’il n’est pas homme de couleur, M^e Blanchet ne s’en défendrait pas s’il l’était ; il a combattu lui-même ce préjugé ; il cite une foule de citoyens recommandables qui *sont de sang [*606] mêlé : M. le général Roche, M. le docteur Fournier. Il en cite d’autres, auxquels il reconnaît un vrai talent ; mais à l’égard de ceux qui sont en Haïti, il s’abstiendra de dire leurs noms, parce que ce serait les exposer à l’animadversion du président Boyer.

“ Au reste, quand une goutte imperceptible ou apparente de sang Africain coulerait dans les veines du demandeur, il n’en serait pas moins Français, et en droit d’actionner le président. Mais il repousse la qualification d’homme de couleur, parce que son acte de naissance, du 21 plu-

(i) “ Quelques contestations se sont élevées sur la réalité de cette interruption, rapportée par la *Gazette des Tribunaux* : mais tous les doutes ont dû cesser depuis que M^e Isambert a publiquement déclaré que c’était lui qui l’avait adressée à M^e Blanchet. Ainsi la *Gazette des Tribunaux* a été, selon son usage, parfaitement exacte.”

viôse an VI., n'en fait pas mention, comme le prescrivaient les réglemens coloniaux.

“ ‘On a,’ ajoute M^e Blanchet, ‘dans la consultation et à l’audience, insisté sur ce que j’aurais reçu 2,500 gourdes (12,500 fr.) sur mes travaux. Je n’en ai reçu que 500. Les 2,000 gourdes de surplus auront peut-être été portées dans les comptes d’Haïti, et gardées par le président Boyer pour se les approprier.’

“ M. le président observe que dans la consultation de M^e Isambert, il est dit que cette somme a été payée sur la cassette du président.

“ ‘Dans ce cas,’ répond M^e Blanchet, ‘il ne peut se dispenser d’en produire la quittance.’

“ M^e Isambert demande à répondre sur les insinuations que M^e Blanchet s’est permises contre lui à l’audience. Cette réponse est nécessaire, parce que M^e Blanchet ne lit pas exactement les documens dont il fait usage.

“ M. le président.—‘Le Tribunal verrait avec regret que deux hommes honorables se livrassent à l’audience à des personnalités; peut-être M^e Blanchet, plaidant dans sa propre cause, a pu se servir de quelques expressions qu’il eût pu adoucir; mais le Tribunal n’a rien entendu qui nécessitât une réponse.’

“ M^e Isambert.—‘Si telle est l’opinion du Tribunal, n’étant ici que conseil, je ne prendrai pas la parole. J’attendrai que M^e Blanchet ait publié textuellement le plaidoyer d’aujourd’hui; alors je pourrai répondre à ce qui paraîtra l’exiger, en regrettant que ces explications ne soient plus de nature à se passer entre nos amis communs.’

“ A l’audience du 23, M. Lizot, procureur du Roi, a porté la parole.

“ Ce magistrat, après avoir retracé en peu de mots les faites de la cause, se hâte d’aborder les hautes et importantes questions qu’elle présente à résoudre. Il rappelle que la république d’Haïti oppose à la demande de M^e Blanchet, 1^o l’incompétence des Tribunaux Français; 2^o l’insaisissabilité des marchandises arrêtées, et que de plus elle réclame la suppression des écrits du procès comme irrévérens, injurieux, diffamatoires, soit envers elle, soit envers son président.

“ Il pense que par cette dernière prétention la république ne s’est point rendue irrecevable à proposer l’incompétence, parce *que les deux demandes sont d’une nature entièrement différente; qu’elles peuvent subsister ensemble, parce que l’effet de l’une n’a aucun rapport avec l’effet que l’autre doit produire; que d’ailleurs l’abandon de ses moyens ne se présume pas. [*607]

“ Arrivant à la question d’incompétence, il établit que M^e Blanchet est naturel Français, et qu’en cette qualité il peut se prévaloir des dispositions de l’art. 14 du Code Civil; il convient que le demandeur ne peut se dire Français, par cela seul qu’il est né Français à Saint-Domingue, avant l’émancipation; car il résulterait de ce système que tous les habitans de Saint-Domingue, nés avant l’ordonnance royale, seraient encore Français. Il convient encore que l’indépendance a le même effet que la conquête; que, comme elle, elle soumet au nouvel état les sujets de l’ancien.

“ ‘Mais,’ ajoute M. le procureur du Roi, ‘la métropole, dont le

nouvel état se détache, ne perd que ce que la puissance nouvelle a voulu acquérir ou a réellement acquis. Ce qu'elle rejette ne subit ni changement ni incorporation. Qu'a donc acquis Haïti, colonie Française, depuis des siècles? Lors de la révolution de 1791, les noirs ne s'arrêtèrent dans leur fureur que lorsqu'ils n'eurent plus de maîtres à massacrer ou à proscrire. Ceux qui échappèrent vivrent en France, ou cherchèrent un asile sur d'autres terres hospitalières. Ces Européens, qui ne pouvaient rester sans danger sur le sol de Saint-Domingue, déjà teint du sang de leurs frères, dans des temps plus calmes, furent encore déclarés incapables de toute fonction publique. Haïti les a toujours rejetés de son sein; ils n'ont pas été un seul instant soumis à la domination étrangère. Français quand il s'agissait de les proscrire, ils sont encore Français quand il s'agit de les défendre.

“M^e Blanchet revint en France, en 1800, avec son père; il a fait ses études à Paris, où il a été inscrit sur le tableau des avocats. Il est donc Français comme tous les anciens colons expulsés. En vain dirait-on, tardivement d'ailleurs, qu'il est d'origine Africaine; cette prétention invraisemblable devrait être prouvée autrement que par des assertions.

“Français à son arrivée en Haïti, M^e Blanchet n'a point perdu sa qualité par la naturalisation acquise en pays étranger. La naturalisation est un fait, qui ne se peut opérer que d'après les lois du pays dont on doit devenir sujet. Or, M^e Blanchet n'a rempli ni pu remplir les conditions imposées par la constitution Haïtienne; il n'a ni la couleur ni la résidence voulue; il est donc encore Français.

“Mais il a accepté des fonctions à l'étranger! Sans doute; mais sont-elles du nombre de celles qui font perdre la qualité de Français? S'est-il exposé à contrarier les intérêts de son pays? Ces fonctions sont-elles incompatibles avec les devoirs de fidélité envers la patrie? Il fut défenseur public, ce qui équivaut à la qualité d'avocat en France; mais nulle loi représentée ne dit que *pour être avocat à Haïti il faille [608] être Haïtien. Le ministère public pense que pour appliquer le 2^e § de l'art. 17 du Code il faut que le Français ait rempli une sorte de magistrature, que cet article a un but politique, et il tire argument d'un avis du conseil d'état, du 21 Janvier, 1812.

“On dit encore: “Il a fixé un établissement sans esprit de retour.” Mais, s'il en eût été ainsi, s'il eût voulu fixer son existence en Haïti, n'aurait-il pas accepté les hautes fonctions, les faveurs qui lui étaient offertes? Par sa jeunesse et ses talens il eût été entraîné dans la carrière brillante qui lui était ouverte. Son refus prouvait l'esprit de retour; il voulait revenir en France, où il avait laissé des amis, des souvenirs honorables, où on le considère encore comme Français, inscrit sur le tableau des avocats de Paris, dans cette France que les étrangers visitent avec envie et ne quittent qu'à regret, et qu'un Français n'abandonne jamais pour patrie;

“La question la plus délicate de ce procès, continue le ministère public, est celle de savoir si la république Haïtienne est, dans l'espèce, justiciable des Tribunaux de la France. Habitué, comme Français, à respecter les actes de la volonté royale comme magistrat, à les faire respecter, vous n'attendez pas de nous, Messieurs, que nous révoquions

un seul instant en doute l'indépendance du gouvernement d'Haïti. Nous examinerons, en droit rigoureux, si un état étranger peut, dans certains cas, subir la juridiction de nos Tribunaux.' Le magistrat établit une distinction lumineuse entre le gouvernement qui agit comme dépositaire de la puissance publique et dans l'exercice de cette puissance, et le gouvernement agissant dans l'exercice de son intérêt privé, comme corporation, comme personne morale.

“ Dans l'exercice de son droit public extérieur avec d'autres nations, de son droit public intérieur avec ses sujets, vouloir tracer des règles à un état qui use de ses droits, serait rompre l'égalité, violer son indépendance ; mais lorsqu'il forme des obligations civiles, lorsqu'il se lie lorsqu'il s'engage comme les particuliers dans un intérêt purement privé, c'est alors qu'il devient individu soumis aux mêmes lois. Or, l'art 14 du Code Civil est positif ; s'il est vrai de dire que les gouvernemens peuvent être, dans certains cas considérés comme personne morale, il doit être appliqué, dans toute sa rigueur, sans examiner si la disposition législative règle ou non le droit des gens ou le droit civil. En France, l'état est soumis à la juridiction des Tribunaux quand il s'agit de régler ses intérêts privés ; il est assimilé alors au simple particulier. Aussi a-t-il fallu une loi spéciale pour le dispenser de la caution exigée dans l'art. 2185 du Code Civil.

“ En vain, lorsqu'il s'agit d'intérêts privés, on objecterait les droits de souveraineté, d'indépendance des nations, parce que ces droits ne sont point compromis ; ils n'existent pour les gouvernemens qu'en tant qu'ils agissent dans l'exercice de leur puissance *publique, qui seule ne peut se soumettre à des maîtres ; mais ce principe est sans con- [*609] séquence dans l'obligation privée de sa nature. Aussi Kluber dit-il que c'est *comme nation* que les gouvernemens sont hors la juridiction des Tribunaux, parce qu'alors ils rentrent dans l'état de nature.

“ Lorsque la république d'Haïti traduit des Français devant les Tribunaux, sans contredit on peut exiger d'elle la caution *judicatum solvi* (art. 16., Code civil,) uniquement parce que ce mot *étranger* s'entend de tout demandeur qui n'est pas Français, et dans ce cas, nulle atteinte ne serait portée ni à sa dignité, ni à son indépendance, parce qu'alors elle n'agirait point dans l'exercice de sa puissance publique.

“ L'objection tirée de ce que, lors de la discussion du Code, on retrancha un article relatif aux ambassadeurs, fortifie la distinction qui doit dominer cette importante matière, en ce que l'ambassadeur, représentant sa nation dans l'exercice de sa puissance publique, ne pourrait, sans violation du principe de l'égalité et de l'indépendance, être soumis à la juridiction privée.

“ Après avoir posé cette base fondamentale de sa discussion, le ministère public examine les diverses objections faites par la république, objections dont il trouve la solution par voie de conséquence, et résumant ses principes avec force et concision, il conclut encore sur cette seconde question en faveur de M^e Blanchet.

“ Une dernière question se présente, c'est celle de savoir si M^e Blanchet a pu saisir-arrêter les marchandises de la république d'Haïti.

“Le ministère public se demande qui les avait empreintes du sceau de l'insaisissabilité? Ce n'est point l'ordonnance d'émancipation; il n'existe et on n'invoque aucun traité qui les excepte du droit commun; elles sont alors, comme propriété ordinaire, régies, quant à la saisissabilité, par les art. 557, 558, du Code de procédure. Il se peut que dans l'intention de la république elles eussent une destination certaine. Mais où en est la preuve légale pour les tiers qui ne voient et ne peuvent voir que le propriétaire actuellement saisi? Cette volonté, d'ailleurs, peut changer, et on ne peut dire que de plein droit toutes les propriétés Haïtiennes, sur le sol Français, soient destinées au paiement de la dette des 150 millions.

“Les fonds publics Français sont exceptés des règles ordinaires, il est vrai, mais les exceptions sont de droit étroit; il a même fallu une loi spéciale pour déroger au droit commun, et il n'existe, en France, aucune loi qui déclare insaisissables les marchandises d'Haïti.’

“Quant à la question de suppression d'écrits, qui a été convertie en une demande en réserve, le ministère public pense qu'il faut surseoir à statuer jusqu'à la discussion du fond, parce qu'alors, seulement, on pourra juger du mérite des faits allégués dans la demande.

*“Après ces conclusions, le défenseur de la république a pro-
[*610] duit la pétition de M^e Blanchet pour être nommé défenseur public à Haïti, pétition dans laquelle il reconnaît *qu'il revient dans son pays*.

“M^e Blanchet répond que cette pétition ne change rien aux principes du droit que la loi Française lui confère, qu'elle n'est d'aucune importance, et que les adversaires la connaissent depuis long-temps.

“A l'audience du 25, le Tribunal a prononcé son jugement par lequel il considère M^e Blanchet comme Français d'origine, ayant conservé cette qualité; mais déclare les Tribunaux Français incompétens, parce que l'art. 14 du Code ne régit que les rapports des particuliers entre eux, et sous ce point de vue même contient une exception au droit commun, exception qui doit être restreinte dans les termes rigoureux de la loi.

“Relativement aux réserves, le Tribunal ayant égard à la position où se trouvait M^e Blanchet et aux injures à lui prodiguées dans les journaux et même dans les journaux d'Haïti, a débouté le président de la république de sa demande; mais il a condamné M^e Blanchet aux dépens.

(From the Gazette des Tribunaux, May 3, 1828. Numéro 855.)

Tribunal De 1^{re} Instance (1^{re} Chambre.)

(Présidence de M. Moreau.)

Audience du 2 Mai.

AFFAIRE DE LA MAISON BALGUERIE, DE BORDEAUX, CONTRE LE GOUVERNEMENT ESPAGNOL. (k)

AFFAIRE DE MM. TERNAUX, GANDOLPHE ET COMPAGNIE, CONTRE LA REPUBLIQUE D'HAÏTI. (l)

M. LE PRESIDENT Moreau a prononcé le jugement suivant dans l'affaire Balguerie:—

“ ‘Attendu que le droit de juridiction est une émanation de la souveraineté ;

“ ‘Attendu que l'art. 14 du Code civil ne peut être appliqué à un souverain étranger, d'abord parce qu'il ne dispose que pour les obligations contractées envers un Français par un individu étranger, et encore parce qu'on ne pourrait l'étendre aux souverains *étrangers sans porter atteinte au droit qu'a tout gouvernement indépendant d'être seul juge de ses actes; [611]

“ ‘Attendu, en fait, que l'opposition formée par la maison Balguerie entre les mains d'Aguado, a pour cause l'exécution d'un traité passé entre S. M. catholique en cette maison pour l'affrètement d'un certain nombre de navires destinés à transporter les troupes du gouvernement espagnol ;

“ ‘Qu'un pareil traité est évidemment un acte d'administration publique, et ne peut, sous aucun rapport, être considéré comme contrat privé ;

“ ‘Attendu, d'un autre côté, que les deniers sur lesquels l'opposition a été formée, sont des deniers publics destinés au paiement de l'emprunt royal espagnol, et qui ne pourraient être saisis sans entraver la marche de ce gouvernement ;

“ ‘Qu'admettre une personne privée à saisir en France les fonds d'un gouvernement étranger, serait violer, les principes sacrés du droit des nations, et s'exposer ainsi à des représailles funestes ;

“ ‘Attendu, enfin, que les jugemens des Tribunaux Français étant sans autorité hors du royaume, le gouvernement espagnol ne pourrait pas être forcé de s'y soumettre, et par conséquent de reconnaître la validité du paiement qui serait fait par Aguado ;

“ ‘D'où il suit que le Tribunal est incompétent.

“ ‘Fait main levée de l'opposition, ' etc.”

(k) Gazette des Tribunaux, 19th and 26th April.

(l) Ib., 26th April.

Tribunal Civil de la Seine (1^{re} Chambre.)

(Présidence de M. de Belleyme.)

Audience du 16 Avril.

S. A. MEHEMET-ALI, VICE-ROI D'EGYPTE, ET M. SOLON, AVOCAT.—FONDATION D'UNE ECOLE D'ADMINISTRATION PUBLIQUE EN EGYPTE.—DEMANDE EN 100,000 FRANCS DE DOMMAGES-INTERETS.(*m*)

“CETTE affaire, qui promettait des révélations sur le gouvernement du vice-roi et sur les relations de la France avec l’Egypte, avait attiré à l’audience une grande affluence de curieux.

“S. A. Méhémet-Ali, vice-roi d’Egypte, était représentée par M. Odilon Barrot, qui, comme on sait, a fait récemment un voyage en Orient, et qui mieux que personne, en sa qualité de frère de notre consul-général en Egypte, pouvait donner au Tribunal des explications sur le véritable état des choses en Egypte.

[*612] “Voici dans quelles circonstances le vice-roi d’Egypte avait à se défendre devant le Tribunal de la Seine contre une demande en 100,000 francs de dommages-intérêts :—

“M. Solon, dont le nom était d’un heureux augure pour donner à l’Egypte des leçons d’administration et de civilisation, avait été choisi par l’intermédiaire de M. Macarel, conseiller d’Etat, et d’Artim-Bey, secrétaire de S. A. le pacha d’Egypte, pour aller fonder au Caire une école d’administration publique. Il était dit que M. Solon resterait pendant huit ans au service du vice-roi. Il devait recevoir 15,000 francs de traitement par an et un logement digne de sa mission et dans le voisinage de l’école. Au mois d’août, 1845, M. Solon, à la suite de quelques difficultés avec le vice-roi, quitta l’Egypte et revint en France. Il a prétendu que le vice-roi lui avait signifié un congé sans motif, et qu’il avait dû céder à la toute-puissance du pacha. De retour en France, M. Solon a fait pratiquer des saisies-arrêts entre les mains de deux négociants de Marseille, sur les valeurs et marchandises qu’ils pouvaient avoir pour le compte du gouvernement Egyptien. Depuis, ces saisies-arrêts ont été dénoncées au gouvernement Egyptien en la personne d’Artim-Bey, représentant et mandataire du pacha. De plus, M. Solon a fait assigner le gouvernement Egyptien devant le Tribunal civil de la Seine, pour le faire condamner à lui payer 100,000 francs de dommages-intérêts, tant pour six années de traitement que pour frais de voyage en Egypte et de retour en France. Un jugement par défaut dont nous avons rendu compte, l’an dernier, a accueilli la demande de M. Solon.

“S. A. le vice-roi a formé opposition au jugement rendu contre lui par le Tribunal de la Seine. Aujourd’hui, il prétendait que le Tribunal de la Seine était incompétent.

“M. Odilon Barrot, avocat de S. A. Méhémet-Ali, vice-roi d’Egypte, s’exprime ainsi :—

“C’est un gouvernement étranger qui est assigné devant vous, et qui

l'est pour une action personnelle, à raison d'un acte essentiellement gouvernemental. Poser ainsi la question, c'est assez vous dire que le débat est hors du droit civil ordinaire, et qu'il a son siège dans le droit des gens. Il s'agit, en effet, de savoir si on peut traduire un gouvernement étranger devant les Tribunaux Français pour un acte de sa souveraineté. L'indépendance des Etats, les conditions de la souveraineté, les principes incontestés du droit des gens, ne permettent pas qu'on soutienne d'aussi étranges principes. Aucune discussion n'est possible à cet égard. Tous les auteurs qui se sont occupés du droit des gens, Montesquieu, Vattel, Puffendorf, tous ont consacré le principe de l'indépendance des gouvernemens, et soutenu que la juridiction d'un état ne pouvait apprécier les actes d'un gouvernement étranger. La juridiction découle de la souveraineté. Pour que les Tribunaux Français fussent compétens, il faudrait admettre que la juridiction existe indépendamment de la souveraineté. A cet égard, les principes sont si évidens que le vice-roi ne pourrait *accepter pour juge un Tribunal de France sans abdiquer sa souveraineté. [*613]

“ ‘Je vais vous exposer rapidement les faits qui ont donné naissance au procès actuel.

“ ‘M. Solon, avocat, ancien conseiller de préfecture à Montauban, a accepté la mission d'aller au Caire, en Egypte, en qualité de professeur d'administration publique ; M. Solon est entré au service du gouvernement Egyptien avec de grands avantages matériels. Il devait recevoir 15,000 fr. par an. De plus, M. Solon avait au Caire une vaste maison à sa disposition, et indépendamment de tous les avantages que la munificence éclairée du pacha sait si bien prodiguer, M. Solon avait à remplir en Egypte une mission glorieuse et digne de tenter la plus noble ambition, d'exciter les sentimens les plus élevés d'un grand cœur, les pensées les plus vastes d'un esprit éminent. Si le vice-roi a arraché l'Egypte par la force de sa volonté et l'énergie de son gouvernement à l'anarchie militaire, s'il a pu asseoir dans ce pays une sécurité telle qu'une femme peut traverser le désert et faire sans danger le voyage de la Palestine, s'il a réussi au milieu des conflits Européens à assurer sa puissance et à fonder une dynastie, il y avait une chose qui n'était au pouvoir ni de sa force ni de son génie,—c'était d'improviser et de créer des hommes éclairés et capables par leurs lumières de conduire l'Egypte en la soutenant dans les voies de la civilisation où il la faisait entrer. Voilà pourquoi Méhémet-Ali s'est adressé à la France, à laquelle appartiennent toutes ses sympathies, et où il envoie des élèves destinés un jour à concourir aussi à l'œuvre glorieuse qu'il se propose.

“ ‘M. Macarel, que le Tribunal connaît et que nous honorons tous, avait été chargé par Artim-Bey, le secrétaire du vice-roi, de chercher un homme digne de cette mission. M. Macarel choisit M. Solon. M. Solon ne pouvait ambitionner un plus noble rôle que celui qui lui était offert. Préparer par l'enseignement un peuple entier à la civilisation, transporter dans l'Orient, en instruisant les jeunes Egyptiens qui devaient plus tard régir les destinées de leur pays, les idées de la France, la civilisation de l'Occident, c'était la plus belle et la plus sainte mission.

“ ‘Quand on sait pour quels motifs futiles, pour quelles causes subal-

ternes M. Solon a renoncé à ce sacerdoce, on le regrette pour lui, pour sa destinée, pour sa gloire. M. Solon a abandonné l'Égypte et renoncé à sa mission, parce que le vice-roi l'a prié de quitter le palais qu'il habitait pour le céder au chérif de la Mecque, au chef de la religion musulmane, que le sultan traite d'égal à égal. Le vice-roi a offert à M. Solon de venir habiter le palais qu'occupait le ministre des affaires étrangères. Ce n'était pas assurément une demeure indigne de M. Solon. Cependant il a résisté à tout,—sommations des ministres, invitations du vice-roi.

[*614] Seulement Méhémet-Ali a dû alors lui laisser cette alternative, ou *de quitter le palais ou de quitter l'Égypte. M. Solon a préféré quitter l'Égypte.

“ M. Solon a insinué qu'il avait été renvoyé du Caire parce qu'il y professait en plein Orient des doctrines qui étaient plus ou moins en harmonie avec les règles qui dominent le gouvernement Égyptien. Alors même que l'insinuation de M. Solon serait exacte, le Tribunal Français aurait-il de droit d'apprécier cet acte du gouvernement de Méhémet-Ali. Il serait assez étrange de voire faire une enquête ordonnée par un Tribunal Français pour savoir de quelle façon on enseigne au Caire et en Égypte l'administration publique. Il suffit de poser cette hypothèse pour faire ressortir combien il est exorbitant de faire juger par un Tribunal Français le service d'un fonctionnaire qui s'est soumis à un gouvernement étranger.

“ En résumé, je vous ai démontré que le Tribunal était incompétent sous deux rapports, la qualité de la partie assignée et la nature de l'acte soumis à votre appréciation. Quelle est la qualité de la partie assignée? C'est un gouvernement étranger qui est assigné devant vous directement pour un acte administratif, pour avoir destitué un fonctionnaire, un agent de son autorité.

“ Quelle est la nature de l'acte déferé à votre justice? C'est un acte d'un gouvernement étranger.

“ En vertu de quelle loi, M. Solon peut-il fonder son action contre le gouvernement Égyptien? En vertu de l'article 14 du Code civil? Mais il s'agit dans cet article d'étrangers résidens, il ne s'agit pas d'un gouvernement étranger.

“ Sous le double rapport de la qualité de la partie assignée et de la nature de l'acte, l'incompétence du Tribunal est, je crois, démontrée.

“ M. Solon présente sa défense en ces termes :—

“ La présence de mon contradicteur me place dans un singulier embarras. Comment pourrai-je m'expliquer sur sa plaidoirie en présence de rapports si bienveillans et si confidentiels qui m'ont attaché à M. le consul-général de France (M. Adolphe Barrot?) Oh! oui, sans doute, on a eu raison de le dire, la cause est grave, car si elle intéresse l'Égypte et les gouvernemens étrangers, elle intéresse bien davantage encore l'indépendance du pays et l'intérêt d'un grand nombre de nos compatriotes. Que le Tribunal veuille donc songer aussi à la cause de ces Français et les défendre contre un déni de justice aussi caractérisé que celui qu'on veut lui faire consacrer.

“ Je suis parti en 1844 pour l'Égypte, ajoutant foi à la réputation si extraordinairement usurpée du pacha. J'acceptai la mission grande,

nationale et philanthropique qui m'était offerte. Je ne fis aucune difficulté sur les conditions, et je partis après avoir obtenu une ordonnance royale qui m'autorisait à exécuter le contrat que je venais de former avec Méhémet-Ali. Arrivé en Egypte, je fus surpris du singulier accueil qui me fut fait : on parla hautement de mystification, et il n'y eut pas une seule voix *qui voulut prendre au sérieux le contrat qui m'amenait en Egypte. Moi qui, de bonne foi, venais pour former des hom- [*615] mes à la connaissance du droit administratif, je proposai de me charger de quelques jeunes gens qui seraient plus tard placés dans les ministères. Tout me fut accordé. Il en coûtait peu, et d'ailleurs des réserves étaient faites pour l'avenir, réserves qui devaient empêcher le succès de mes soins. Bientôt arriva l'époque où les élèves qu'on m'avait confiés devaient être examinés, et c'est alors que le pacha ne sut plus déguiser sa pensée ; mes élèves furent admirables. L'examen fut brillant, trop brillant, et les sujets payèrent cher les éloges qui leur furent prodigués. Quant à moi, je fus vivement interpellé par le secrétaire du pacha, qui me dit que la pacha n'entendait pas ainsi l'administration publique que j'étais chargé d'enseigner, et que j'aurais dû me borner à donner à mes élèves quelques notions sur les successions.

“ Les successions, grand Dieu ! répondis-je au secrétaire du pacha, mais elles sont réglées par le Coran, et tout infidèle qui se permet d'expliquer les saintes écritures de l'Islamisme mérite la mort. “ Ah ! c'est juste ! ” me dit mon interlocuteur. Telle fut la seule réponse qui me fut faite. Je me trompe. On me fit une réponse plus catégorique. Mes jeunes gens furent sacrifiés. On leur refusa toute espèce de grades, et ils durent déplorer avec moi les tristes conséquences de mes enseignemens.

“ Dès ce moment s'accomplissait cette prédiction qu'on trouve consignée dans un ouvrage publié récemment par M. Schœlcher, sous le titre de *L'Egypte en 1845*.

“ On lit dans cet ouvrage, page 61, chapitre VI. :—

“ “ Il y a trois ou quatre ans à peine, Méhémet-Ali a fait venir de France un jurisconsulte, M. Solon, pour établir au Caire un cours de droit administratif. C'est encore une de ces jongleries sur lesquelles il comte pour tromper l'Europe. A quoi servirait un cours de droit administratif dans ce pays où règne le bon plaisir, et auquel on ne veut pas donner d'administration parce qu'on veut conserver l'arbitraire. Le vice-roi a confié cinq élèves à M. Solon, et au bout de la première année il a voulu lui enlever le meilleur, pour en faire, quoi ?—le chef d'une buanderie. M. Solon paraît homme à ne pas conserver de rôle dans la grande comédie Egyptienne. Il exigera probablement l'organisation définitive de son école avec ses conséquences sérieuses, et comme on ne voudra pas lui accorder, il y a lieu de croire que la toile tombera avant peu sur l'intermède qu'on lui avait confié.”

“ Il me fut impossible, dit M. Solon, de ne pas voir où on voulait en venir. Cependant je tins bon. Je demandait de nouveaux élèves ; on m'en donna qui savaient à peine épeler les mots. Ils me demandèrent de les faire nommer lieutenans, en déclarant qu'ils partiraient tous si je ne pouvais leur obtenir de grades. La condition était rigou-

reuse, impossible ; je ne pouvais m'y soumettre, et je vis partir tous mes nouveaux élèves, qui *furent chercher leur grade ailleurs. [*616] Cependant, ma résignation fatiguait le pacha, et il me fit encore donner six élèves qui me faisaient aussi des conditions. Je ne pouvais plus y tenir, et pour faire cesser cet état de choses réellement insupportable, je fis un rapport qui était d'ailleurs obligatoire à Méhémet-Ali. Je lui demandai, avec tous les égards possibles, l'organisation de son école. Je passai sous silence tous mes justes griefs. Je consentis à ne pas parler de faits de la plus haute gravité ; je voulais rendre impossible tout mauvais procédé.

“ ‘Je connaissais bien mal les hommes auxquels j'avais affaire. Mes égards furent pris pour de la faiblesse. On repoussa toute demande d'organisation. On se mit à me tourmenter pour mon logement, qu'on voulut me faire quitter malgré les promesses formelles qui m'avaient été faites. J'écrivis que j'étais prêt à quitter ce logement ; je me bornai à demander quelques jours. Je reçus alors une lettre d'Artim-Bey qui contenait la phrase la plus inconvenante. Enfin, après une correspondance que je regrette de ne pouvoir faire connaître aujourd'hui au Tribunal, je reçus un ordre de départ. J'étais remercié. Je fus chez le consul-général de France, M. Barrot, frère de mon honorable adversaire ; je lui demandai son appui pour faire exécuter mon contrat : tout fut inutile. J'avais affaire à un prince et à des conseillers qui ne comprennent pas la justice. Je ne pus même obtenir que des arbitres fussent chargés de prononcer sur ma réclamation.

“ ‘C'est alors que je fis donner assignation à Méhémet-Ali devant M. le consul-général de France pour assister au dépôt de mon contrat, et je partis pour la France. Arrivé à Marseille, et porteur de mon contrat revêtu de la formule exécutoire, je fis saisir les marchandises du pacha dans l'entrepôt de Marseille. J'ai demandé plus tard au Tribunal de la Seine la validité de la saisie. Le Tribunal, jugeant par défaut, il est vrai, a accueilli ma demande, et c'est sur l'opposition du pacha d'Egypte que le Tribunal est appelé à statuer.’

“ M. Solon s'attache à repousser l'incompétence soutenue au nom du pacha d'Egypte. ‘Je conviens,’ dit-il, ‘qu'on ne peut pas faire une saisie dans le domicile d'un ambassadeur, ni sur un prince en passage sur le territoire national. Mais si un prince fait des affaires en France, s'il a sur notre territoire des marchandises, des meubles, etc., tous ces objets sont saisissables.’ M. Solon cite Martens, Vattel, Klüber, Weathon, etc.

“ ‘De quoi s'agit-il ? D'une saisie fait au préjudice de Méhémet-Ali, à Marseille ; au préjudice du pacha faisant le commerce, ayant ses courtiers, ses consignataires, et étant sans nul doute soumis à ce titre aux lois de douanes. Pourquoi donc,’ dit M. Solon, ‘ne pourrais-je pas de même exercer des poursuites sur les denrées, sur les marchandises qu'il a en France, à raison de son négoce, car il est incontestable que Méhémet-Ali, tout en étant pacha en Egypte, est en même temps négociant.

[*617] * ‘Maintenant, Messieurs, permettez-moi d'arrêter votre attention sur un point assez délicat de cette affaire. Vous savez que Méhémet-Ali n'est plus un souverain comme il l'a été. Le traité

de 1840 l'a soumis à la Porte, l'a forcé de reconnaître la souveraineté du sultan. S'il est souverain encore, ce n'est qu'un souverain sous-ordre ; c'est pourquoi il s'appelle le vice-roi. Il n'a pas, il ne peut avoir le privilège de la souveraineté ; il cherche bien à l'avoir tout entière, mais ce n'est là qu'une prétention. On se rappelle la courtoisie dont Ibrahim-Pacha, le fils de Méhémet-Ali, vice-roi d'Egypte, a été l'objet dans son récent voyage en France et son séjour à Paris. Quand Ibrahim fut reçu aux Tuileries, il y fut présenté par l'ambassadeur Ottoman.

“Je rappellerai encore que le droit des gens et le droit international qui règlent les relations entre les puissances chrétiennes, est tout à fait différent de celui qui régit les rapports de l'Europe avec les peuples d'Orient.

“Le droit international a été fondé par les puissances chrétiennes à l'époque des croisades et contre les Musulmans. Quant à ceux-ci ils ont des principes tellement incompatibles avec ceux de l'Europe, que tous les auteurs sont d'accord pour reconnaître ces différences essentielles qui ne permettent pas aux chrétiens de se laisser juger par les magistrats Musulmans. On reconnaît bien que l'empire Ottomam cherche à rentrer dans notre droit international, mais jusqu'ici ce rapprochement est loin d'être complet.’

“M. Solon cite Weathon, Histoire du Droit des Gens, et Schmalz, Du Droit des Gens, ainsi que les traités de 1542 et 1740, qui ne permettent pas aux magistrats Musulmans de juger un chrétien s'il n'est assisté d'un représentant du consulat.

“‘Je le demande,’ dit M. Solon, ‘quel serait donc le juge que me donnerait mon honorable contradicteur ? Des juges Musulmans, le gouvernement du pacha, je n'en veux pas, car ils ne connaissent d'autres principes que celui-ci : *le gouvernement, toujours le gouvernement*, tout vient de lui et toute revient à lui !

“‘Sachez-le donc, Messieurs, le gouvernement de Méhémet-Ali *ne doit jamais rien perdre*. C'est en vertu de ce droit odieux qu'au retour de l'armée de Syrie on faisait payer aux soldats qui avaient été blessés et faits prisonniers les armes que l'ennemi leur avait enlevées. C'est ainsi qu'on osait faire payer à un pharmacien les onguens et compresses employées pour panser les blessés, parce qu'il n'avait pas retiré de quittances ; c'est ainsi qu'on faisait prêter au frère les impositions du frère absent ; c'est ainsi qu'un de nos compatriotes, M. Grégoire, ayant été indignement bâtonné, le ministre coupable, qui s'était permis cette infamie, fut récompensé au lieu d'être puni : le coupable fut promu à des fonctions importantes dans le ministère des finances. C'est ce même fait qui a déterminé le départ de M. de Lavalette, notre consul-général, et, par suite, la nomination de M. Adolphe Barrot.

“‘Oh ! qu'il est à déplorer que mon contradicteur n'ait connu l'Egypte qu'au milieu des fêtes préparées sur son passage ; [*618] combien il est à regretter qu'on lui ait laissé ignorer les malheurs des pauvres habitans de l'Egypte, il saurait pourquoi je n'ai pas voulu me soumettre à cette justice à la Turquie. Non jamais, je n'accepterai les juges d'Egypte, et si la justice du pays me manquait je n'humilierais pas la robe d'avocat que je porte jusqu'à me soumettre au jugement du pacha.

“ M^e. Odilon Barrot réplique dans l'intérêt du pacha d'Egypte, commence ainsi :—

“ ‘ Mon adversaire a abusé de la réserve qui m'était commandée dans cette affaire en venant apporter à votre barre certains faits, certaines inductions contrel esquels je dois protester avec le démenti le plus formel. Ma position personnelle dans ce débat, m'interdit d'entrer dans des explications sur les faits dont vous a parlé M. Solon. Je n'ai pas à défendre aujourd'hui le gouvernement Egyptien que mon adversaire vient d'attaquer. Il a prétendu que le gouvernement de Méhémet-Ali n'était pas une souveraineté, parce que le vice-roi paie un tribut à la Porte. Cela est vrai, mais ce n'est pas là la question qui s'agit entre nous en ce moment.’

“ M^e. Odilon Barrot soutient que M. Solon a traité avec Méhémet-Ali, comme avec un souverain étranger, puisqu'il a demandé et obtenu l'autorisation du gouvernement Français pour entrer au service du gouvernement Egyptien. ‘ Mon adversaire,’ dit-il, ‘ a si bien compris que le débat était entre lui et le gouvernement Egyptien, qu'il a assigné en la personne du ministre des affaires étrangères du vice-roi.’

“ M^e. Odilon Barrot, après avoir résumé sa première discussion sur la question de compétence, termine ainsi :—

“ ‘ Cette question est d'une grave importance, non seulement pour vous, Monsieur (l'orateur s'adresse à M. Solon,) mais encore pour tous les Français qui s'honorent eux mêmes, et qui honorent la France en consacrant leur intelligence au développement de la civilisation naissante de l'Orient. Mais qu'on y songe, si le vice-roi se voit en butte aux attaques des Français qu'il prend à son service, s'il se voit traduit pour des actes de son pouvoir devant des Tribunaux Français, il repoussera loin de lui les représentans de notre pays.’

“ M. l'avocat du Roi Mongis a pris la parole en ces termes :—

“ ‘ On vous l'a dit, Messieurs, la question est grande, mais la simplicité est presque toujours l'attribut de la grandeur. A ce titre, nous croyons le débat facile à préciser, et nos conclusions ne se feront pas attendre.

“ ‘ Le Tribunal est-il compétent pour statuer entre M. Solon et S. A. Méhémet-Ali ?

“ ‘ Et d'abord, sur quel point s'agit la question de compétence ? Il semblerait, à entendre l'une des parties, qu'elle vous demande [*619] *simplement à faire un acte conservatoire ou à saisir en vertu d'un titre depuis long-temps passé en force de chose jugée. On vous cite des auteurs qui ont reconnu saisissables les biens de toute nature appartenant même à des souverains sur un sol étranger.

“ ‘ Mais la difficulté n'est pas là : ce que l'on vous demande, c'est ce titre même qui manque à M. Solon ; c'est la condamnation dont il a besoin pour agir contre son adversaire ; c'est la consécration du fond même de son droit, sans en apprécier les limites.

“ ‘ Et c'est ici que se présentent deux graves questions préjudicielles, tirées, la première de la qualité de l'une des parties, la seconde de la nature du contrat.

“ ‘ Sur la première question, celle de souveraineté, elle a été débattue

par le défenseur de Méhémet-Ali, avec l'autorité de cette voix grave et sévère qui se prête si bien aux grandes considérations d'ordre public. Nous nous en référons sur ce point à ce qui a été dit, ne voulant pas l'affaiblir en le répétant. Nous ajoutons seulement que M. Solon a rendu l'argumentation plus puissante contre lui en reconnaissant qu'il avait traité avec le vice-roi d'Egypte en même temps qu'avec Méhémet-Ali, avec le prince souverain, inséparable, selon lui, du simple particulier, et pour tout dire en un mot, la nature des institutions qui régissent l'Orient rendait cette confusion inévitable, car là tous les pouvoirs reposent dans une seule main, et c'est là qu'il est encore permis aux princes de dire : *L'Etat, c'est moi.*

“ La nature du contrat ne résiste pas moins à la compétence, car M. Solon n'a pas fait une marché, il a accepté une fonction publique; il s'est mis au service d'une puissance: il ne relève que d'elle seule, quant à la rémunération qu'elle a pu lui accorder.

“ Et voyez, Messieurs, combien ceci est frappant ! Supposez un Français acceptant des fonctions du prince en France, là où vous avez, comme on dit, plénitude de juridiction, est-ce à vous que ce fonctionnaire viendrait demander le règlement de son honorable salaire ? Non, une autre juridiction devrait être saisie. Eh quoi ! alors que la fonction relève d'un prince étranger, libre, indépendant, alors que la difficulté grandit de toute la puissance d'une question de droit international, c'est à votre barre que le fonctionnaire étranger traînerait une souveraineté étrangère ?

“ Cela est impossible.

“ Si M. Solon prétendait qu'il a fait un marché et non pas accepté une fonction, nous lui répondrions avec une lettre adressée par lui à M. le garde-des-sceaux de France, lettre par laquelle “au moment,” dit-il “d'accepter une fonction à l'étranger il en demande l'autorisation à son gouvernement naturel, afin de ne pas perdre sa qualité de Français.”

“ La question ainsi précisée, Messieurs, nous ne croyons pas devoir alarmer vos esprits par un aperçu des graves difficultés des complications de toute nature que pourrait entraîner l'exécution de votre jugement, s'il était favorable aux vœux du demandeur, *Ces difficultés sont d'une telle nature, cependant, qu'elles ont pesé pour [*620] beaucoup dans la fixation de la jurisprudence qui, pour le dire en passant, est à peu près unanime et constante dans le sens des principes que nous défendons. C'est quelque chose, en effet, dans le doute, que cet adage : *Salus populi, suprema lex esto !*

“ M. l'avocat du Roi fait remarquer en peu de mots qu'en agitant longuement la question de savoir si S. A. était ou non un souverain indépendant, on n'a fait tout au plus que reculer la difficulté. En effet, en supposant que le vice-roi relevât de la Porte, pour la ratification du contrat dont il s'agit, cette ratification a eu lieu tacitement, et, en tous cas, le procès engagé contre le Porte elle-même n'en serait peut-être que plus difficile.

“ Messieurs, dit en terminant M. l'avocat du Roi, puisque l'on a beaucoup élevé ce débat, puisque l'on a cru devoir de parti et d'autre apprécier d'une manière bien différente l'attitude et les droits de l'Egypte

envers les nationaux Français, qu'il nous soit permis de ne pas rester tout à fait étranger à ces appréciations. Il est digne de la magistrature Française de rendre hommage à un prince qui vient apprendre en France à gouverner les hommes selon la loi, qui vient demander à la France de combler l'abîme qui sépare encore l'Orient de l'Occident, la barbarie de la civilisation, le despotisme de la liberté, l'arbitraire de la légalité. Et vous ne voudrez pas, Messieurs, que ce prince, qui s'est montré plein d'admiration pour vos lois, parce qu'elles sont égales pour tous, puisse croire qu'il s'est trompé, et que vos lois, en respectant la liberté des individus, se plaisent à violer l'indépendance des nations et la souveraineté des princes.'

Le Tribunal, conformément à ces conclusions a rendu le jugement dont voici le texte :—

“ ‘Attendu que selon les principes du droit des gens, les Tribunaux Français n'ont pas juridiction sur les gouvernemens étrangers, à moins qu'il ne s'agisse d'une action à l'occasion d'un immeuble possédé par eux en France comme particulier, ce qui emporte attribution territoriale et exécution.

“ ‘Attendu qu'en matière de déclinatoire le juge doit avant tout consulter les termes de la demande ;

“ ‘Attendu que l'action de Solon est une action personnelle qu'il motive sur un prétendu engagement, dont la rupture lui aurait causé un préjudice ;

“ ‘Attendu que toutes les expressions de la demande lui donnent le caractère personnel et révèlent qu'elle est dirigée contre le gouvernement Egyptien, et non contre un particulier ;

“ ‘Attendu que pour apprécier cette demande, il ne faudrait pas examiner un acte particulier ayant pour cause un intérêt privé ; mais un acte administratif et gouvernemental, intervenu entre un gouvernement et un fonctionnaire, auquel il a été conféré un emploi et une mission dont [*621] le demandeur a dû peser les conséquences *qu'il serait en outre nécessaire de rechercher les causes de la rupture qui motive l'action ; que de pareilles appréciations ne sauraient appartenir à la juridiction Française.

“ ‘Attendu que la demande ne tend pas seulement à faire valider des saisies-arrests pratiquées sur des marchandises appartenant soit au gouvernement Egyptien, soit à Méhémet-Ali personnellement, mais d'abord et avant tout, préjudiciellement, à obtenir contre ce gouvernement la somme de 100,000 francs de dommages-intérêts.

“ ‘Reçoit S. A. Méhémet-Ali opposant au jugement rendu par défaut, le 25 Août 1846, et faisant droit, déclare ledit jugement non avenu ;

“ ‘Se déclare incompétent sur la demande introduite par M. Solon, et le condamne aux dépens.' ”

APPENDIX V. (PAGES 141-2, s. cxxvii.)

EMBASSY.

No. 1.

Instrument of Subrogation.(n)

“X. Les ministres des puissances qui ont le droit d’ambassade, peuvent-ils le mettre en exercice ?

“Ils ne le peuvent pas d’eux-mêmes ; mais quelquefois leurs maîtres leur en confèrent le droit, et alors ils en usent comme délégués.

“Gustave-Adolphe, Roi de Suède, ayant été tué à la bataille de Ludzen, le 16 Novembre, 1632, le sénat de Stockholm chargea du gouvernement de toutes les affaires le chancelier Oxenstiern. Celui-ci nomma en conséquence Hugues de Groot (Grotius) à l’ambassade de France, et lui fit expédier des lettres de créance en son nom. Le Cardinal de Richelieu, qui régnait alors sous le nom de Louis XIII., fit beaucoup de difficulté de l’admettre : il prétendait que le pouvoir général du chancelier ne s’étendait pas *jusqu’à donner à un autre le caractère représentatif, [*622] et que le sénat de Suède pouvait seul conférer ce caractère à Groot. Ces raisons triomphèrent d’abord ; mais le chancelier de Suède, passant en France, représenta au cardinal que le roi ne pouvait pas rejeter son ambassadeur, sans porter atteinte aux traités qu’il avait faits avec le roi lui-même, et pour lesquels on n’avait pas contesté la suffisance de ses pouvoirs. Cette considération fléchit le ministre : Groot fut agréé, et on le traita, dit Wicquefort (liv. i., sect. 3.) ‘comme ambassadeur du Suède, et non du chancelier qui lui avait donné sa commission, en vertu de la procuration qu’il tenait du sénat.’

“Quelque temps après, le Comte de Pegnarande, ambassadeur d’Espagne, nomma des ministres pour les négociations de Munster : voici les termes de la commission qu’il leur fit expédier : ‘d’autant qu’il a plu au Roi d’Espagne, mon seigneur, nous donner pouvoir et autorité, par ses lettres du 25 Février, 1645, de traiter paix ou trêve avec les hauts et puissans seigneurs, états des Provinces-Unies, lesquelles lettres commencement ainsi . . . ; c’est pourquoi, en vertu du pouvoir et autorité que Sa Majesté nous a donné, par lequel je puis me faire assister d’une et de plusieurs personnes, et par lequel il m’est permis de me les substituer, subroger et de les nommer, je nomme et constitue par ces présentes frère Joseph de Bergagne, archevêque de Malines, Diego de Soavadra et Antoine Lebrun . . . , tous et chacun d’eux, plénipotentaires à la paix universelle de Munster, auxquels j’aï fait passer et fais passer la même autorité et le même pouvoir à moi attribués par Sa Majesté, et les substitue à moi ; afin qu’au nom et de la part de sadite Majesté, ils puissent négocier et conclure tous traités de paix ou de trêve, ou tous, ou bien chacun d’eux en particulier, tant en mon absence qu’en ma présence.’

“Wicquefort (ibid.) remarque que ces ministres furent reçus et traités,

(n) Merlin, Répertoire de Jurisprudence, tit. Ministre Public, vol. x. s. 10, p. 256.

non comme ambassadeurs du Comte de Pegnarande, mais comme *plénipotentiaires* du Roi d'Espagne.

“ Il en serait de même aujourd'hui en France, si un régent députait des ministres dans une cour étrangère. Ces ministres ne seraient pas considérés comme envoyés par le régent, mais par le roi lui-même, et ce serait Sa Majesté qui parlerait dans leurs lettres de créance.

“ C'est ainsi que, pendant la régence du Duc d'Orléans, le Cardinal Dubois ne négociait à La Haye la triple alliance de 1717, qu'en vertu de lettres de créance, de pleins pouvoirs et même d'instructions officielles rédigées au nom du roi mineur.

“ Il est vrai (comme l'atteste Wicquefort à l'endroit cité) que, pendant la détention des rois Jean et François I, le Dauphin Charles et la Duchesse d'Angoulême s'attribuaient, en vertu de la régence qui leur avait été décernée, le droit d'envoyer en leur nom des ambassadeurs aux [*623] cours étrangères. Mais c'est qu'alors *les régens gouvernaient dans une forme différente de celle qui a été établie depuis. V. l'article *Régence*.

“ Dans le temps que l'Espagne avait à Naples un vice-roi, à Milan un gouverneur, et à Bruxelles un gouverneur-général, elle laissait à ces officiers le droit de traiter en leur nom, par ambassadeurs, avec les autres puissances.

“ Le premier Avril, 1524, il fut conclu entre le pape, la ville de Florence et l'Empereur Charles-Quint, un traité dans lequel celui-ci n'était représenté que par Gattinara, plénipotentiaire du Comte de Lanoy, vice-roi de Naples.

“ Dans le même siècle, le Duc d'Albe, successeur du Comte de Lanoy, députa à Rome le Marquis Trévico.

“ En 1562, Don Pédro d'Aragon, vice-roi de Naples, fit complimenter Charles IX. sur son exaltation, par un ministre que le nouveau pape accueillit très-bien.

“ En 1577, Don Juan d'Autriche, gouverneur des Pays-Bas, envoya des ambassades solennelles à l'empereur, aux princes d'Allemagne et au Roi d'Angleterre.

“ En 1588, il se tint en Flandre un congrès de ministres espagnols et anglais; et, quoique les lettres de créance des premiers en fussent signées que du Duc de Parme, gouverneur-général des Pays-Bas, cela n'arrêta pas les conférences.

“ Dix ans après, le Cardinal Albert d'Autriche, successeur du Duc de Parme, envoya une députation aux villes anséatiques.

“ Pour le gouverneur de Milan, il était tellement respecté dit Wicquefort, ‘ que, dès qu'il arrivait dans son gouvernement, tous les princes voisins le faisaient complimenter par leurs ambassadeurs, et il répondait à leur civilité en leur envoyant les siens.’

“ Cependant, en 1646, Caumartin, ambassadeur de France auprès des Cantons Suisses, se trouvant avec Casati, ambassadeur du gouverneur de Milan, lui contesta la qualité qu'il s'attribuait; il prétendit que, n'ayant point de lettres de créance du Roi d'Espagne, on ne pouvait pas le considérer comme ministre de ce prince; et qu'en conséquence, les cantons ne devaient pas lui donner audience dans leur assemblée générale.

Casati réclama vainement la possession du gouverneur de Milan, de traiter par ambassadeurs avec toutes les cours voisines, et le traitement que son père et ses deux frères avaient eux-mêmes reçu en cette qualité, quoique leurs lettres de créance ne fussent signées que de lui ; les raisons de Caumartin l'emportèrent, et l'assemblée générale ne voulut pas donner audience à Casati, quoiqu'on la lui eût promise.

“De nos jours encore, nous avons vu le besoin et l'usage placer quelquefois un corps diplomatique auprès de ces officiers principaux à qui, dans l'éloignement, le souverain donnait différens titres. Ainsi, avant la conquête de la Belgique, Bruxelles avait encore des Ministres étrangers, résidant près du gouverneur-général des Pays-Bas autrichiens.

“Les mêmes motifs autorisent les gouverneurs Européens en *Amérique à envoyer des ambassadeurs près des nations sauvages, [*624] à en recevoir d'elles, et à se députer respectivement des officiers avec ce caractère public.

“Nos grandes compagnies de commerce en Asie et en Afrique, envoyaient et recevaient pareillement des députés, qui, pour en imposer davantage, ne manquaient pas de prendre le titre d'ambassadeurs ; on a donné ce titre à des lieutenans d'infanterie, à des facteurs de comptoir, à un capucin.

“Mais on sent bien que, pour agir ainsi, il fallait que ces compagnies en eussent reçu du gouvernement l'autorisation expresse et spéciale.”

No. 2.

An Act for preserving the Privileges of Ambassadors, and other publick Ministers of foreign Princes and States.(o)

WHEREAS several turbulent and disorderly persons having in a most outrageous manner insulted the person of His Excellency Andrew Artemonowitz Mattueof, Ambassador Extraordinary of His Czarish Majesty, Emperor of Great Russia, Her Majesty's good friend and ally, by arresting him, and taking him by violence out of his coach in the publick street, and detaining him in custody for several hours, in contempt of the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other publick ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable ; be it therefore declared by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in Parliament assembled, and by the authority of the same, That all actions and suits, writs, and processes commenced, sued, or prosecuted against the said ambassador, by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognizances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or colour of any such action or suit, writ or process, and all judgments had

thereupon, are utterly null and void, and shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever.

II. And be it enacted by the authority aforesaid, that all entries, proceedings, and records against the said ambassador, or his bail, shall be vacated and cancelled.

[*625] *III. And to prevent the like insolencies for the future, be it further declared by the authority aforesaid, that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign Prince or State, authorized and received as such by Her Majesty, her heirs or successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

IV. And be it further enacted by the authority aforesaid, that in case any person or persons shall presume to sue forth or prosecute any such writ or process, such person and persons, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted, by the confession of the party, or by the oath of one or more credible witness or witnesses, before the Lord-Chancellor, or Lord-Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the publick repose, and shall suffer such pains, penalties, and corporal punishment, as the said Lord-Chancellor, Lord-Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.

V. Provided, and be it declared, that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or publick minister, shall have or take any manner of benefit by this Act; and that no person shall be proceeded against as having arrested the servant of an ambassador or publick minister, by virtue of this Act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex for the time being, or their under sheriffs or deputies, who shall, upon the receipt thereof, hang up the same in some publick place in their offices, whereto all persons may resort, and take copies thereof without fee or reward.

VI. And be it further enacted by the authority aforesaid, that this Act shall be taken and allowed in all Courts within this kingdom as a publick Act; and that all judges and justices shall take notice of it without special pleading; and all sheriffs, bailiffs, and other officers and ministers of justice, concerned in the execution of process, are hereby required to have regard to this Act, as they will answer the contrary at their peril.

*No. 3.

[*626]

Memoir of the French Minister (1772) on the Privileges of Ambassadors

"NO. III.

"Mémoire que le ministre de France fit remettre aux ambassadeurs et ministres étrangers résidant à Paris, en Février, 1772.(p)

"L'IMMUNITÉ des ambassadeurs et autres ministres publics, est fondée sur deux principes ; (1) *sur la dignité du caractère représentatif auquel ils participent plus ou moins* ; (2) *sur la convention tacite qui résulte de ce qu'en admettant un ministre étranger, on reconnaît les droits que l'usage, ou, si l'on veut, le droit des gens lui accorde.*

"Le droit de représentation les autorise à jouir, dans une mesure déterminée, des prérogatives de leurs maîtres. En vertu de la convention tacite, ou, ce qui est la même chose, en vertu du droit des gens, ils peuvent exiger qu'on ne fasse rien qui les trouble dans leurs fonctions publiques.

"L'exemption de la juridiction ordinaire, qu'on appelle proprement *immunité*, découle naturellement de ce double principe. Mais l'immunité n'est point illimitée ; elle ne peut s'étendre qu'en proportion des motifs qui lui servent de base.

"Il résulte de là (1) *qu'un ministre public ne peut en jouir qu'autant que son maître en jouirait lui-même ;*

"(2) *Qu'il ne peut en jouir dans le cas où la convention tacite entre les deux souverains vient à cesser.*

"Pour éclaircir ces maximes par des exemples analogues à l'objet de ces observations, on remarquera :

"(1) Qu'il est constant qu'un ministre perd son immunité, et se rend sujet à la juridiction locale, lorsqu'il se livre à des manœuvres qui peuvent être regardées comme *crime d'Etat*, et qui troublent la sécurité publique. L'exemple du Prince de Cellamare constate ces maximes à cet égard.

"(2) L'immunité ne peut avoir d'autre effet que d'écarter tout ce qui pourrait empêcher le ministre public de vaquer à ses fonctions.

"De là, il résulte que la personne seule du ministre jouit de l'immunité, et que ses biens pouvant être attaqués sans interrompre ses fonctions, tous ceux qu'un ministre possède dans le pays où il est accrédité, sont soumis à la puissance territoriale, et *c'est par une suite de ce principe, qu'une maison ou une rente qu'un ministre [*627] étranger posséderait en France, seraient sujettes aux mêmes lois que les autres héritages :

"(3) La convention tacite sur laquelle l'immunité se fonde, cesse lorsque le ministre se soumet formellement à l'autorité locale, en contractant par-devant un notaire, c'est-à-dire en invoquant l'autorité civile du pays qu'il habite.

"Wicquefort qui, de tous les auteurs, est le plus zélé pour la défense

du droit des ministres publics, et qui s'y livrait avec d'autant plus de chaleur qu'il défendait sa propre cause, convient de ce principe et avoue :

“ *Que les ambassadeurs peuvent être forcés de remplir les contrats qu'ils ont passés par-devant notaire, et qu'on peut saisir leurs meubles pour prix de loyer des maisons, dont les baux auraient été passés de cette manière.* (T. I. p. 416.)

“(4) L'immunité étant fondée sur une convention, et toute convention étant réciproque, le ministre public perd son privilège, lorsqu'il en abuse contre les intentions constantes de deux souverains.

“C'est par cette raison qu'un ministre public ne peut pas se prévaloir de son privilège pour se dispenser de payer les dettes qu'il peut avoir contractées dans les pays où il réside :

“(1) Parce que l'intention de son maître ne peut point être qu'il viole la première loi de la justice naturelle, qui est antérieure aux privilèges du droit des gens ;

“(2) Parce qu'aucun souverain ne veut, ni ne peut vouloir que ces prérogatives tournent au détriment de ses sujets, et què le caractère public devienne pour eux un piège et un sujet de ruine :

“(3) On pourrait saisir les biens mobiliers du prince même que le ministre représente, s'il en possédait sous notre juridiction ; de quel droit les biens du ministre seraient-ils donc exceptés de cette règle ?

“(4) L'immunité du ministre public consiste essentiellement à la faire considérer comme s'il continuait à résider dans les Etats de son maître.

“Rien n'empêche donc d'employer vis-à-vis de lui les moyens de droit dont on userait s'il se trouvait dans le lieu de son domicile ordinaire.

“(5) Il en résulte qu'on peut le sommer d'une manière légale, de satisfaire à ses engagements et de payer ses dettes, et Bynkershoek décide formellement, p. 186, *que ce n'est pas peu respecter la maison d'un ambassadeur que d'y envoyer des officiers de justice, pour signifier ce dont il est besoin de donner connaissance à l'ambassadeur.*

“(6) Le privilège des ambassadeurs ne regarde que les biens qu'ils possèdent comme ambassadeurs, et sans lesquels ils ne pourraient exercer les fonctions de leur emploi.

“Bynkershoek, p. 168, et 172, et Barbeyrac, p. 173, sont de cet avis, et la cour de Hollande a adopté cette base dans l'ajourne-
[*628] ment qu'elle fit signifier en 1721 à l'envoyé de Holstein, *après avoir accordé saisie de tous ses biens et effets, autres que meubles et équipages, et autres choses appartenantes à son caractère de ministre.*—Ce sont les termes de la cour de Hollande du 21 Février, 1721.

“Ces considérations justifient suffisamment la règle qui est reçue dans toutes les cours, qu'un ministre public ne doit point partir d'un pays sans avoir satisfait ses créanciers.

“Lorsqu'un ministre manque à ce devoir, quelle est la conduite à tenir ? c'est la seule question essentielle que la matière puisse faire naître. Elle doit se décider par un usage conforme aux différentes maximes qu'on a établies ci-dessus.

“On ne parlera point de l'Angleterre, où l'esprit de la législation, borné à la lettre de la loi, n'admet point de convention tacite, ni de pré-

somption, et où le danger d'une loi positive dans une matière aussi délicate, a jusqu'ici empêché de fixer légalement les prérogatives des ministres publics.

“ Dans toutes les autres cours, la jurisprudence paraît à peu près égale, les procédés seuls peuvent différer.

“ A Vienne, le maréchalat de l'empire s'arroge, sur tout ce qui ne tient pas à la personne de l'ambassadeur et à ses fonctions, une juridiction proprement dite, dans une étendue qu'on a quelquefois envisagée difficile à concilier avec les maximes généralement reçues. Ce tribunal veille d'une manière particulière sur le paiement des dettes contractées par les ambassadeurs, surtout au moment de leur départ.

“ On en a vu l'exemple, en 1764, dans la personne de M. le Comte de Czernicheff, ambassadeur de Russie, dont les effets furent arrêtés jusqu'à ce que le Prince de Liechtenstein se fut rendu sa caution.

“ En Russie un ministre public est assujetti à annoncer son départ par trois publications. On y arrêta les enfans, les papiers et les effets de M. de Bausset, ambassadeur de France, jusqu'à ce que le roi eut fait son affaire des dettes que ce ministre avait contractées.

“ A la Haye, le conseil de Hollande s'arroge une juridiction proprement dite dans les Etats où les intérêts des sujets se trouvent compromis.

“ En 1688 un exploit fut signifié à un ambassadeur d'Espagne en personne, qui en porta des plaintes (Bynkershoek, p. 188;) les Etats jugèrent qu'elles étaient fondées, en ce qu'il n'aurait fallu remettre l'exploit qu'aux gens de l'ambassadeur.

“ A Berlin, en 1723, le Baron de Posse, ministre de Suède, fut arrêté et gardé, parce qu'il refusait de payer un sellier, malgré les avertissemens réitérés du magistrat.

“ A Turin, le carosse d'un ambassadeur d'Espagne fut arrêté sous le regne d'EMANUEL. La cour de Turin se disculpa à la vérité de cette violence; mais personne ne réclama contre les *procédures qui avaient été faites pour condamner l'ambassadeur à payer ses [*629] dettes.

“ Ces exemples paraissent suffire pour établir en principe qu'un ministre étranger peut être contraint à payer ses dettes. Ils constatent même l'extension qu'on a quelquefois donnée au droit de coaction.

“ On a soutenu qu'il suffisait d'avertir le ministre de payer ses dettes pour justifier, en cas de refus, les voies judiciaires et même la saisie des effets.

“ Grotius, liv. ii. chap. 18, dit : *que si un ambassadeur a contracté des dettes et qu'il n'ait point d'immeubles dans le pays, il faut lui dire honnêtement de payer; s'il le refusait, on s'adresserait à son maître, après quoi on en viendrait aux voies que l'on prend contre les débiteurs qui sont d'une autre juridiction.*

“ Or ces voies sont les procédures légales qui tombent sur les biens de l'ambassadeur, autres que ceux qui sont immédiatement nécessaires à l'exercice de ses fonctions, ainsi qu'on l'a déjà observé.

“ L'opinion la plus modérée est, qu'il convient dans tous les cas de s'abstenir, autant qu'il est possible, de donner atteinte à la décence qui doit environner le caractère public; mais le souverain est autorisé à em-

ployer l'espèce de coaction qui n'emporte aucun trouble dans ses fonctions, et qui consiste à interdire à l'ambassadeur la sortie du pays, avant qu'il ait satisfait à ses engagements.

“ C'est dans ce sens que Bynkershoek conseille d'employer contre les ambassadeurs des actions qui emportent plus une défense qu'une ordre de faire telle ou telle chose. Ce n'est alors qu'une simple défense, et personne n'oserait soutenir qu'il soit illicite de se défendre contre un ambassadeur, qui ne doit pas troubler les habitans en usant de violence et emportant ce qui appartient à autrui.

“ Cette maxime est encore plus de saison, lorsque des circonstances particulières et aggravantes chargent le ministre du reproche de mauvaise foi et de manœuvres répréhensibles.

“ Lorsqu'il viole lui-même ainsi la sainteté de son caractère et la sécurité publique, il ne peut point exiger que d'autres le respectent.

“ Pour appliquer ces maximes au cas particulier de M. le Baron de Wrech, ministre plénipotentiaire du Landgrave de Hesse-Cassel, il suffit de rappeler sa conduite depuis son arrivée à Paris, et surtout depuis huit mois.

“ Les voies indécentes qu'il avait adoptées pour se procurer de l'argent, ayant été supprimées, il s'est livré à toutes sortes de manœuvres, que les ménagemens qu'on a pour son caractère empêchent de caractériser.

“ On se contentera de remarquer, que tout conduit à penser que ce ministre a formé le dessein de frustrer ses créanciers en sortant du royaume; et cette circonstance suffit pour autoriser *à prendre [*630] contre lui les mêmes mesures qu'on prendrait, s'il était effectivement sorti du royaume, après avoir déposé son caractère par la remise de ses lettres de rappel.

“ Le ministère des affaires étrangères l'a fait exhorter par le magistrat chargé de la police, et l'a exhorté lui-même, à faire honneur à ses engagements.

“ Dès-lors les poursuites qu'on pouvait faire contre lui devenaient légitimes, pourvu qu'elles ne passassent pas les bornes indiquées plus haut.

“ Le Marquis de Bezons se trouvait même dans un cas plus particulier; le Baron de Wrech avait contracté avec lui par écrit; il avait promis de fournir caution bourgeoise pour l'exécution du bail de la maison. Le Baron de Wrech avait donc contracté l'engagement d'assujettir indirectement cette exécution à la juridiction territoriale dans la personne de sa caution. Il est vrai qu'il n'a pas jugé à propos de remplir cette obligation; mais comme il est assurément le garant de son propre fait, le Marquis de Bezons pouvait, selon les règles de l'équité et du bon sens, s'en prendre à lui-même; et il ne peut être admis à se faire un titre de la mauvaise foi même qui caractérise le refus d'exécuter cette clause de la convention.

“ C'est d'après ces considérations que, sur les plaintes multipliées des créanciers du Baron de Wrech, le ministre des affaires étrangères crut devoir suspendre l'expédition du passeport que ce ministre demanda pour sortir du royaume, en alléguant des ordres du Landgrave son maître, jusqu'à ce que les intentions de ce prince fussent connues par le canal du ministre qui réside de la part du roi auprès de lui.

“ ‘ Il permit en même temps au Marquis de Bezons de faire valoir ses droits par les voies légales, et il en prévint le Baron de Wrech,

“ ‘ Ce ministre s’étant néanmoins plaint qu’on s’était prévalu de cette permission pour forcer sa porte, pour lui signifier l’exploit de la vente de ses meubles, et tout acte de violence devant être banni des procédés en pareil cas, on n’a pu s’empêcher de blâmer cet excès, et on a cru devoir suspendre toute poursuite ultérieure. Mais, afin de concilier la protection que le roi doit à ses sujets, avec les égards dus au caractère public, et afin de remplir tous les procédés que les règles du droit des gens peuvent dicter, le ministère des affaires étrangères vient de déférer au Landgrave lui-même la conduite de son ministre.

“ ‘ Ce prince pourra d’autant moins trouver à redire à la conduite qui a été tenue avec son ministre, qu’un fait récent a mis en évidence le sentiment qu’il avait lui-même sur l’immunité. Il fit en effet emprisonner, il y a quatre ou cinq ans, le Comte de Wartensleben, ministre de Hollande, pour le forcer de rendre compte d’une fondation dont il était l’exécuteur. L’entreprise sur la personne d’un ministre public fut à la vérité condamnée; mais les Etats généraux ne contestèrent pas la juridiction du *Landgrave; et, dans le cas où se trouve le Baron de Wrech, [*631] les principes que ce prince a soutenus, ne lui permettront pas de soustraire son ministre aux mesures capables d’assurer les droits des sujets du roi, ni de les priver du seul gage qu’ils aient de l’exécution de leurs conventions avec lui.’

“ La ‘ Gazette de France ’ ayant publié ce mémoire dans une de ses feuilles, le Baron de Wrech en porta plainte au Duc d’Aiguillon; qui toutefois se contenta de lui faire la réponse suivante.

NO. IV.

“ *Lettre du Duc d’Aiguillon au Baron de Wrech ministre de Hesse-Cassel à la cour de France; du 23 Janvier, 1772.*

“ ‘ JE ne perds pas un moment, Monsieur, pour répondre à la lettre que vous m’avez fait l’honneur de m’écrire le 22 de ce mois.

“ ‘ C’est avec une peine bien vive que j’apprends que l’on a inséré dans la gazette de . . . un écrit relatif à votre position et qui vous soit injurieux. Je m’empresse, Monsieur, de vous déclarer que je désavoue tout ce qu’on peut avoir publié sur cette affaire, qui par sa nature et par les mesures que le roi a jugé à propos de prendre doit être tenue secrète. Je ne puis donc qu’applaudir au parti que vous avez pris de demander justice contre la publicité donnée à cette affaire et vous prie d’agréer l’assurance de ma haute considération.

“ ‘ Versailles, le 23 Février, 1772.

“ ‘ LE DUC D’AIGUILLON.’

“ Ce ne fut que lorsque la Landgrave de Hesse-Cassel eût fait son affaire des engagemens pris par le Baron de Wrech, que celui-ci obtint ses passeports, et put quitter Paris.”

No. 4

Ambassador.—Civil Jurisdiction, &c.

TAYLOR V. BEST, DROUET AND SPERLING.(q)

Ambassador—Secretary of Legation—Privilege—Exemption from Suit—Attorning to Jurisdiction—Stay of Proceedings.

"An action having been brought against a foreign minister and other co-contractors, the minister entered an appearance, and allowed the action to proceed till issue joined, and got a rule for a special jury. He then applied to the Court to stay all proceedings against him, on the ground that he was exempt from suit in this country; but the Court refused to do so (as he had not been interfered with in his person or his goods,) on the ground that he had attorned to the jurisdiction by his voluntary appearance.

"A secretary and councillor of legation of a foreign Sovereign, appointed by him, and having charge of the executive of the legation, and acting in the absence of the ambassador as *charge d'Affaires*, is a public minister to whom the privileges of ambassadors apply.

"A foreign ambassador does not lose his privilege of exemption from suit, by trading in this country although his domestic servants do, under the limitation in the 7 Anne, c. 12, s. 5.

"*Quære*.—Whether an ambassador can be brought unwillingly into the Courts of this country by process not affecting either his person or his goods."

"THIS action was brought against the defendants as directors of a society formed in Belgium and London for working the Royal [*632] Nassau Sulphate of Barytes Mines, to recover deposits paid by the plaintiff on shares in the said society. Before the writ issued in June, 1853, M. Drouet, who was Secretary of Legation of the King of the Belgians, instructed his attorney to write to the attorney for the plaintiff, to ask if a writ was to be issued, and if it was, to direct that it should be sent to him; and after the writ was issued M. Drouet directed his attorney to enter an appearance, which he did accordingly. M. Drouet was abroad from June till the beginning of December on the duties of his office, and in the mean time the action proceeded. M. Drouet pleaded the general issue by his attorney. Notice of trial was given for the 20th of December, and a special jury was obtained on the application of M. Drouet. On M. Drouet's return to England in December, his attorney took out a summons to stay all proceedings, or to strike out his name from the proceedings in the action, on the ground of his privilege as a public minister. The summons was heard before Talfourd, J., who ordered proceedings to be stayed till the 5th day of the next term.

"Willes (Jan. 12) moved for a rule nisi, on behalf of M. Drouet, upon affidavits of the foregoing facts, calling on the plaintiff and the other defendants to show cause why all the proceedings should not be set aside, or further proceedings stayed, or M. Drouet's name struck out; or if the rule should not be made absolute, why M. Drouet should

not be at liberty to withdraw his plea, and plead his privilege as a public minister.

"M. Drouet in his affidavits stated his appointments as second and first Secretary of Legation and public Minister, and alleged that 'he is the duly-appointed and acting Councillor of Legation of His Majesty the King of the Belgians at the Court of St. James's, and that he has the full charge of the executive of the said legation, subject to the direction of His Excellency Sylvan Van de Weyer, the Minister Plenipotentiary of His said Majesty the King of the Belgians, and that in the absence of the said minister he is required to act, and has acted and does act as *chargé d'affaires* to his said Majesty at the said Court.'

"In Lord Coke's time a notion seems to have prevailed that ambassadors and public ministers might be sued upon contracts made during the time of their embassy in the country where they were serving. But since that time the publicists have changed their opinion, and it is now settled in France, England, America and Holland, that ambassadors are not subject to the jurisdiction of the country to which they are sent, in matters of debt, nor as to any criminal charges, except those of the gravest kind. The passage in Coke, 4 Inst. 154, where he says that ambassadors may have to answer for contracts *good jure gentium*, has since been reprobated. It is commented upon in 2 Stephen's 'Commentaries,' 479. The authorities, which are all collected in *'Wild-man's Institutes of International Law,' show that for the pur- [*633] poses of suit an ambassador is in a state of exterritoriality. The Law of Nations on the subject is declared by the statute 7 Anne, c. 12. The secretary of an embassy has the same powers as a public minister. Vattel, b. 4, c. 9, s. 122.

"The Court having granted a rule nisi,

"Montagu Chambers and Pearson (Jan. 30) showed cause.—In this case the Court is called upon to interfere under the general Law of Nations or under the statute 7 Anne, c. 12, to set aside the proceedings in the action as against M. Drouet, on the ground that he is privileged from being sued in the Courts of this country. There is no authority in the books for this course of proceeding; and the proposition contended for on the other side, that an ambassador or minister cannot be sued on any occasion, is not maintainable. On the contrary, it may be affirmed, on the strength of numerous authorities, that an ambassador has not in all cases the privilege to be exempt from the jurisdiction of the criminal or civil Courts of the country to which he is sent. Vattel, in his 'Law of Nations,' b. 4, c. 7, gives several instances in which ambassadors may be dealt with for criminal acts; and so in Bac. 'Abr.' tit. 'Ambassadors,' cases are cited where it was held in England that ambassadors had lost their privilege and were subject to punishment. The Bishop of Rosse's case, temp. 13 Eliz., and the case of Don Pantaleon Sa.(r) It being clear, therefore, that in certain cases ambassadors are amenable to the criminal jurisdiction, the next question is, whether they are ever amenable to the civil jurisdiction of the country in which they

are resident. Now Vattel, b. 4, c. 8, says that an ambassador may, with the consent of his Sovereign, voluntarily submit to the civil jurisdiction, and moreover (sec. 114,) that 'should a minister (as it has often been the case) embark in any branch of commerce, all the effects, goods, money, and debts, active and passive, which are connected with his mercantile concerns, *and likewise all contests and lawsuits to which they may give rise*, fall under the jurisdiction of the country.' This passage supports the authority of Lord Coke, 4 Inst. 153, which, it is said on the other side, more recent authors have called in question. Lord Coke says: 'But if a foreign ambassador, being pro-rex, committeth here any crime which is *contra jus gentium*, as treason, felony, adultery, or any other crime which is against the Law of Nations, he loseth the privilege and dignity of an ambassador, as unworthy of so high a place, and may be punished here as any other private alien, and not to be remanded to his Sovereign but of curtesie. *And so of contracts that be good jure gentium he must answer here.*' Molloy, 'De Jure Maritimo,' b. i. c. [*634] 10, s. 16, *citing Grotius, 'De Jure Belli et Pacis,' lib. ii. c. 18, s. 9, notices this passage of Lord Coke's, and states in the margin that 'An ejectionment hath been brought and left at the house of an ambassador, and it was allowed good, and conceived no breach of their privilege, in the case of M. Colbert, for York House, Mich 28 Car. 2, in Banco Reg.'

"[Maule J.—'There is nothing there to show that there was any intention to disturb Colbert in his possession.']

"Wicquefort, in the 27th and the 28th chapters of his work on 'The Ambassador and his Functions,' which treat of the inviolability of ambassadors, nowhere states that they cannot be sued, Yet Bynkershoek, 'De Foro Legatorum' (c. 16,) seems to think that Wicquefort has gone too far in the assertion of the privileges of ambassadors, and says, 'Scilicet in regionibus ubi ob bona convenimur, et ex eorum arresto forum sortimur, nullus dubito, *quin et legatorum bona arresto detineri, et per hoc ipsi in jus vocari possint.* Bona, dico, sive immobilia, sive mobilia, dummodo neque ad personam ejus pertineant, neque tanquam legatis possideant, uno verbo, sine quibus legationem recte obire potest.' In Burlamaqui's 'Principles of Politic Law,' part 4, c. 15, s. 12, s. 8, it is said, that if a foreign minister has contracted debts, and his master, on application, refuses to do justice, then the creditor may seize the effects of the ambassador. By the laws of Holland and other countries where the Civil Law prevails, land of an ambassador has been taken *ad fundandam jurisdictionem*. The privilege of an ambassador cannot be greater than that of the Sovereign whom he represents; and foreign Sovereigns have been held to be subject to the jurisdiction of the civil tribunals of this kingdom. For instance, in the case of *The Emperor of Brazil v. Robinson*,^(s) the Court of King's Bench compelled a foreign potentate, plaintiff, to find security for costs in a cause arising out of commercial transactions, on the ground of his being resident abroad—see also *Rothschild v. the Queen of Portugal*.^(t) Such being

(s) 5 Dowl. P. C. 522.

(t) 1 W. Black. 471.

the state of the general law, the next question arises on the statute 7 Anne, c. 12., which is entitled 'An Act for preserving the Privileges of Ambassadors, and other public Ministers of foreign Princes and States.' That Act was passed for a particular occasion, and does not apply to all cases. It is notorious, that it was made to please the Czar Peter, as the Court of King's Bench noticed in the case of *Triquet v. Bath*.^(u) The preamble recites, 'that several turbulent and disorderly persons had in a most outrageous manner insulted the person of the Ambassador Extraordinary of His Czarish Majesty, Emperor *of Great Russia, Her Majesty's good friend and ally;' and then [*635] the 1st section enacts that 'all actions and suits, writs and processes commenced, sued, or prosecuted against the said ambassador shall be null and void,' &c. Then the 3rd section provides, that all processes whereby the person or goods of a minister or his domestic servant may be arrested or seized, shall be void. The 5th section shows that the legislature had an exception in their mind which would apply to ministers who entered into trade; for it provides that no person, subject as a trader to the Bankrupt Laws, who should put himself into the service of any foreign minister, should have the benefit of the Act. The Act was held to apply only to domestic servants whose employment required attendance at the house of an ambassador.—*Wigmore v. Alvarez*^(x) and *Evans v. Higgs*.^(y) In *Novello v. Toogood*,^(z) where an ambassador's servant lived in a house away from the ambassador's, and let part of it in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor-rates.

"[Maule J.—'This gentleman is not a servant of the ambassador, but a minister appointed by his Sovereign.']

"He had not the character or functions of a minister, except in the absence of the ambassador. He ought, at all events, to have negatived in his affidavit that he was a trader, as was done in the case of *Hopkins v. Dobeck*^(a) and *Malachi Carolino's case*.^(b)

"[Willes, for the defendant Drouet, intimated that he did not claim protection as a servant of the ambassador, but as a public minister.]

"It is clear that the defendant as a director of this company was a trader, both within the meaning of the Bankrupt Law (Deacon and De Gex's Bankruptcy, vol. i. p. 40,) and under the Winding-up Act. In *Re the Madrid and Valencia Railway Company*, *ex parte James*,^(c) a company formed for the purpose of making a railway in Spain, with a board of directors both in Madrid and London, the affairs of which were to be regulated by the commercial law of Spain, and two-thirds of the capital was to be subscribed by English shareholders, was held to be within the scope of the Winding-up Act as to the English shareholders. Again, even though the Court should be of opinion that this action will

(u) 3 You. & C. 594.

(x) Fitzg. 200.

(z) 1 B. & C. 554; s. c. 1 Law J. Rep. K. B. 181.

(a) 3 Term Rep. 97.

(c) 19 Law J. Rep. (N. S.) Chanc. 260.

(y) 2 Str. 797.

(b) 1 Wils. 78.

[*636] not lie against the defendant Drouet, that is no reason for setting aside the proceedings. There is no pretence for saying that M. Drouet's person or property is in danger. In *Pilkington v. Stanhope*(*d*) the Court of Chancery ordered a bill against an ambassador to be stayed only for a year and a day, *unless the defendant should return sooner*. Even where it clearly appears, on affidavit in an action of debt, that there is no debt, the Court will not stay proceedings. *Smith v. Curtis*.(*e*) Lastly, the defendant Drouet, by entering an appearance, has submitted to the jurisdiction of the Court.

“Byles, Serj., appeared for the defendant Best, and objected to the striking out of Drouet's name.

“Hannen showed cause for the defendant Sperling. ‘M. Drouet is not entitled to have his name struck out in this action. He is clearly liable to the jurisdiction of this Court with respect to matters of trade in which he has chosen to engage. Martens, in his ‘*Précis du Droit de Gens*,’ lib. 7, c. 5, s. 217, expressly confines the privilege of an ambassador's goods to those which belong to him in his capacity of ambassador, and excepts those which belong to him in any other quality. Wheaton, in the ‘*Elements of International Law*,’ p. 3, c. 1, s. 16, says that the “exemption from the jurisdiction of the local tribunals and authorities does not apply to the contentious jurisdiction which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law.’ So, also, in Klüber, ‘*Droit des Gens*,’ p. 2, tit. 2, s. 1, c. 3, s. 210,—where the exception of goods held otherwise than in the capacity of ambassador is also recognized. The privilege of the minister cannot be greater than that of the Sovereign whom he represents. Now, in Calvin's case,(*f*) it was said that the king of a foreign nation who shall have come into England shall sue and be sued by the name of king; and the case of *The Duke of Brunswick v. the King of Hanover*,(*g*) shows that a foreign Sovereign may be sued in our Courts. When the last-mentioned case was carried, by appeal, to the House of Lords, that question was not determined, but Lord Brougham and Lord Campbell seem to have been clearly of opinion that a foreign Sovereign may be amenable to the tribunals of this country with respect to matters of a private character. The case of *Wadsworth v. the Queen of Spain*(*h*) was decided in favour of the immunity of the Queen, on the ground that the debt which was the subject of the proceedings was incurred in her public and not in her private capacity. The statute of Anne [*637] was only a *declaratory* Act, declaring the Law of Nations, and therefore the commentaries of the foreign jurists are authorities upon the question in this country. In the case of the privilege of peers, which is in some respects analogous, it did not extend to exempt them from proceedings by original writ. If there was anything in this case to affect the validity of the summons, it has been cured by pleading over.

(*d*) 2 Vern. 317.

(*e*) 2 Dowl. P. C. 223.

(*g*) 6 Beav. 1; s. c. 13 Law J. Rep. (N. S.) Chanc. 107.

(*h*) 20 Law J. Rep. (N. S.) Q. B. 488.

(*f*) 7 Rep. 156.

“Willes, in support of the rule.—‘There is no analogy between the proceedings of foreign Courts *ad fundandam jurisdictionem* and the proceedings in this country. The difference is pointed out in Story’s ‘Conflict of Laws,’ s. 546. Vattel does not in reality support what Lord Coke says in the 4th Institute. He discusses the question, and says that the exception does not apply to debts contracted during the continuance of the embassy. M. Drouet, as Secretary of Legation, appointed by his Sovereign, has the same privilege as an ambassador.’ (Vattel.)

“[Jervis, C. J.—‘We are bound by the Law of Nations on that point to consider him as a privileged person.’]

“As to Calvin’s case, Lord Coke is only speaking of titles of foreign nobles, who are only esquires here, but he adds that Baliol, King of Scotland, was a king in England. The case of *The Duke of Brunswick v. the King of Hanover* was a case of a family compact; and the peculiarity of it was that the defendant was both a foreign Sovereign and a subject of this country. The principle which governed that case is not applicable here. Nor is *Wadsworth v. the Queen of Spain* applicable.

“[Jervis, C. J.—‘The foundation of an ambassador’s privilege seems to be that he is to be deemed to be still abroad. But in the present case, M. Drouet has attorned to the jurisdiction.’]

“[Maule, J.—‘Suppose a foreign Sovereign in this country were desirous to have some question decided by the Courts of this kingdom, could he not do so?’]

“The jurists lay it down that, as the privilege of the ambassador is the privilege of his Sovereign, he cannot waive it. So it was said also in *Barbuit’s case*,⁽ⁱ⁾ where it was also said that an ambassador does not lose his privilege by trading, though his servant would do so.

“[Maule, J.—‘That means, that if an ambassador should become a tallow-chandler, he shall not thereby lose the privileges of an ambassador; but it does not decide that he cannot appear.’]

“*Triquet v. Bath* shows that entering an appearance is no waiver. The principle is, that a public minister is not to be molested. Now, issuing a writ has been held to be of itself a molestation. *Gibbons v. Vouillon*.^(k)

“Cur. adv. vult.

*“Judgment was now delivered as follows:—

“Jervis, C. J.—‘I am of opinion that the rule in this case [*638] ought to be discharged. There is no doubt that the defendant M. Drouet fills the office of a public minister, such as the privilege contended for will attach to; and I think it equally clear that if the privilege do attach, as it undoubtedly does attach to the character of minister, it is not, in the case of a minister, interfered with or abandoned by the circumstance of trading, as it would be if the claim were set up in respect of the privileges of a servant of the ambassador, under the statute of Anne. If an ambassador or minister violate the character in

(i) Cas. temp. Talbot, 281.

(k) 8 Com. B. Rep. 483; s. c. 19 Law J. Rep. (N. S.) C. P. 74.

which he is delegated to this country, by entering into commercial transactions, that raises a question between the country to which he is sent and the country from which he is sent; but he does not thereby lose any privilege to which he may be entitled, the privilege being a general privilege, and the limitation attached to the privilege, by reason of trading, being confined by the statute of Anne to the case of servants of the ambassador,—who may lose the privilege. I am reminded that the case referred to, *Barbuit's case*, in the time of Lord Chancellor Talbot, is an authority on that subject. Admitting, therefore, that the applicant in this case is a person entitled to the general privilege, which he has not lost by any trading transactions into which he may have entered,—if such be established to the satisfaction of the Court,—the question is, whether he is entitled, under all the circumstances of the case, to the privilege which he now claims. Now, although it is admitted that no process against person or goods can be available against the person or goods of an ambassador or minister, no case has been cited to show that an application like this, to stay all the proceedings in an action against such a person, is available in the Courts of this country. On the contrary, it appears on examination, that in the case of servants,—and the same principle must apply with reference to ministers,—the practice has been, not to stay all proceedings, but to relieve the person of the servant from the vexation of service of process, or of bail; and the applications have hitherto been,—as far as I can understand them,—where the party has been arrested, to discharge him from the arrest on entering a common appearance. The case of *Crosse v. Talbot*⁽¹⁾ recognizes the old principle. That was a motion, on behalf of the defendant, to set aside a bail-bond given upon his arrest, and that common bail might be accepted for him; and he obtained a rule to show cause: and the rule was afterwards discharged, on the ground that he did not bring himself strictly within the privilege as the servant of an ambassador. The Court held, [*639] that to be privileged he ought to be a domestic *servant, and really to exercise the duties of his office, and that his being a mere nominal servant was not sufficient. The reporter adds, “A great many cases have since been determined upon the same principle; but it was in those cases held that the idea of a domestic servant was not confined to his living in a foreign minister’s house provided he was a real servant, and actually performed the service.” Therefore, the reporter states, as far as his knowledge went, a great many cases had been determined on that kind of application, which was not to stay all proceedings, but to discharge a bail-bond on entering a common appearance, so as to let the proceedings go on. I mention this, not with reference to the general principle of the case, but with respect to the form of application. No case has been produced to the Court of an application where the personal liberty of the defendant has not been interfered with; and, further, I am not aware of any case in which, an action having been brought against several defendants—after the case has advanced, as this has done, up to the time of trial—it has been allowed, upon the appli-

cation of one defendant, to stay all proceedings. If that were permitted, it would follow that all the other defendants having been put to considerable expense, proceedings would have to be begun *de novo*, and what had been expended in the progress of the suit would become utterly useless. It is sufficient to say that I am not aware of any such application having been made. But, apart from the form of this motion, it seems to me that this rule should be discharged upon the merits of the case. It is an action against four defendants; the writ was sued out against M. Drouet, as one of four joint contractors. There is no doubt that the plaintiff was bound in the first instance to sue them all, or he would have been subject to a plea in abatement, and the other defendants would have contested the point of jurisdiction, without minding whether Drouet was the subject of the suit or not. The writ being issued, nothing is done to interfere with the free exercise of the minister's functions, or with his comfort or dignity in this country; but knowing or apprehending that a writ is to be issued, he gives instructions to an attorney in whom he has confidence to write to the attorney for the plaintiff, to ask if a writ is to be issued, and if it is, then to beg that it may be sent to him. He, therefore, solicits the action against him; and voluntarily entering an appearance, he voluntarily submits to the jurisdiction of the Court. Now, it seems to me that, under these circumstances, the defendant (Drouet) cannot now be allowed to complain that a suit has been instituted against him.

“It is contended, and perhaps it is undoubted, that an ambassador or minister has a privilege from suit, or, at all events, from such suits as ultimately result in the taking of his person, or of his goods necessary for his state or comfort; and that he cannot *be compelled, *in invitum* or involuntarily, to enter into litigation in a country in [*640] which he is resident; but it is admitted by all the foreign jurists, that where suits can be founded without attacking the personal liberty or comfort, or interfering with the personal privileges of the individual, they may proceed. Various passages have been cited to show that in countries where the Civil Law prevails, and where jurisdiction can be founded by a proceeding *in rem* in the first instance, the action may proceed where there are houses or land, that are immovable, and may be taken to found the jurisdiction. All movable goods, too, which are unconnected with the comfort or dignity of the minister may be taken for that purpose. When we consider the effect of such proceeding, and what may be done in such case by a minister if he pleases, there seems to be little distinction between that proceeding and the present; because, although it is perfectly true that where the Civil Law prevails, you may proceed by attachment or writ, and incidentally establish the means of litigation between the parties, without interfering with the person of the defendant, yet if the defendant choose, either for the purpose of protecting his goods, or of investigating the question in dispute, to appear, the suit, which was originally *in rem*, is turned into one *in personam*; and it is a daily practice in Scotland, that goods, which were originally taken for the mere purpose of founding the jurisdiction, are held as a pledge or security for the fruits of the judgment, if judgment be ultimately

obtained. If, therefore, you have a right in Holland or elsewhere, by taking goods, to found jurisdiction, and a minister may come in if he please, and turn the suit into a suit *in personam*, he could not then object to the jurisdiction of the Courts. It seems to me that there is no distinction between that case and the case now before us, where the writ was not even served upon the defendant, and where no step was taken to interfere with his person or to disturb his comfort, but where a writ was issued to which he voluntarily appeared, submitting himself to the jurisdiction of the Court. I am not affected by what was so strongly urged in the course of the argument, namely, that the privilege, being the privilege of the Sovereign, cannot be abandoned by the minister; because when the authorities referred to come to be examined, they do not show that a minister may not submit to the jurisdiction for the purpose of having the matter in dispute investigated; but that the sacred character of the person of the ambassador cannot be abandoned by his own voluntary act, and that by interfering with his person or taking the goods necessary to his position, you interfere with the privilege of his master. But that is not the case here. For aught that appears here, M. Drouet was sued only for the purpose of ascertaining the liability of others, he being a necessary party to the action. If he had not chosen to take the [*641] step by which he attorned to the jurisdiction *of this Court, the case might have gone on to judgment, and nothing might have been done in execution to affect him. If, as the fruits of the judgment, a *ca. sa.* or *fi. fa.* had been issued against him, then, of course, the statute of Anne would have applied, and this Court would have interfered to protect him. It seems to me, therefore, under these circumstances, that this Court ought not to interfere on behalf of a party who has submitted to the jurisdiction, and, in fact, courted it.'

“Maule, J.—‘I think, on the ground that M. Drouet has appeared in this action, and allowed it to go through certain stages, this application ought to fail. It is a grave question whether an ambassador, or public minister—which M. Drouet undoubtedly is—is so far protected as not to be liable in any manner, supposing him to object to the jurisdiction. That question is not decided by any legal determination in this country, nor, as far as judicial determinations go, do we find it so determined elsewhere. With respect to mere cases in which a special application was made under the 5th section of the statute of Anne, they were cases in which servants of ambassadors who had been sued and arrested were discharged on common bail. Now, there is a great distinction between an ambassador and the domestic servant of an ambassador. The ambassador has a privilege; and the privilege of his domestic servant is not the privilege of the servant himself, but of the ambassador, and is based on the ground that the arrest of the domestic servant might interfere with the comfort or state of the ambassador. Where these are not interfered with at all, the ambassador is not interfered with by the suit; and the servant has no privilege except that which arises from the privilege of the ambassador. It is an important point, and one fit to be very gravely considered when it fairly arises, whether an ambassador is liable to be sued by process not affecting his person or his goods;

whether by such a process he can be brought, unwillingly, into the Courts of this country, and have his rights determined on, perhaps even so as to interfere with his comfort. A man could not stand by and without care allow a suit to be determined on which the decision would be binding upon him; and, therefore, it may well be questioned whether the privilege of the ambassador is not as extensive as the text of Blackstone alleges it to be. But it is not necessary to decide that point in the present case, because, whatever the extent of the privilege may be, I think where a person voluntarily appears in an action, and allows it to go on without interposing, to an advanced stage, and where there has been no interference with his person or property, and where the action may be carried out with full effect, without interfering at all with such person, —to such a case as that, I think we should do wrong to extend the privilege of ambassadors. I therefore, agree with my Lord Chief Justice, that this rule should be discharged.’

*“Cresswell, J.—‘I agree with the opinion of my Brother [642] Maule, and for the reasons which he has assigned.’

“Williams, J. concurred.

“Rule discharged.”

No. 5.

THE EMPEROR OF BRAZIL v. ROBINSON AND OTHERS.(m)

“MARTIN showed cause against the rule nisi obtained by W. H. Watson, for compelling the plaintiff to find security for costs, on the ground of his being resident abroad. He cited *The Duke de Mondelano v. Christin*. That was an application to compel the plaintiff to give security for costs. He was the Ambassador from the Court of Spain. There Lord Ellenborough said—‘Considering that an ambassador is the immediate representative of the crowned head whose servant he is, it would hardly be respectful in the first instance to exact such a security, unless there were pregnant reasons for believing it to be necessary.’ The ground therefore on which the opinion of the Court in that case proceeded was, that the ambassador was the representative of a crowned head. The Court would not compel that representative to find security for costs, and therefore, *à fortiori*, would not the Court compel the crowned head itself to find security for costs. The present rule must therefore be discharged.

“W. H. Watson, in support of the rule, contended that the case cited on the other side was perfectly distinguishable from the present. There the Spanish Ambassador was resident within the jurisdiction of the Court, and there was no suggestion in the affidavits, on which the application was founded, that the plaintiff was about to remove from the jurisdiction. Here, however, the plaintiff was entirely out of the jurisdiction, and therefore no reason existed for placing him in a better situation than any other plaintiff who was resident abroad.

“Williams, J.—‘If the ambassador could not be compelled to find security for costs, I do not see how I can compel his Sovereign to find

(m) *The Emperor of Brazil v. Robinson*, 5 Dow. 522.

such security. I do not, therefore, think I am authorised to interfere by compelling the plaintiff to find security for costs. The present rule must therefore be discharged. If it is desired, the application may be renewed in the full Court.’

“Rule discharged.”

*“W. H. Watson afterwards renewed his application in the full [*643] Court, and stated that it appeared from the affidavits on which he moved, that the action was on a charter-party, for not duly delivering certain wood shipped by the Emperor from Brazil to this country. His Imperial Majesty, therefore, having engaged in commerce, must be subjected to the same liabilities as any other commercial person. If the proceeding had been in respect of any matter connected with his political rank, the case might have been different.

“Martin showed cause in the first instance, and again cited the *Duke de Montellano v. Christin*.

“Lord Denman, C. J.—‘I think that the case cited in opposition to this application is clearly distinguishable from the present. There, the ambassador was in this country merely in his political capacity, and there was no reason to suppose that he was desirous of leaving the country, or going out of the jurisdiction. Here, however, the Emperor appears to have engaged in a commercial transaction, and to be resident out of the jurisdiction. I see no reason, therefore, for exempting him from the necessity of finding security for costs, to which any other person bringing such an action would be subjected. The present rule must consequently be made absolute.’

“Littledale, J., Patteson, J., and Coleridge, J., concurred.

“Rule absolute.”

No. 6.

LAW OF UNITED STATES OF NORTH AMERICA.⁽ⁿ⁾

“§ 1525. UNDER the confederation, an exclusive power was given to Congress of ‘sending and receiving ambassadors.’ The term ‘ambassador,’ strictly construed, (as would seem to be required by the second article of that instrument,) comprehends the highest grade only of public ministers; and excludes those grades which the United States would be most likely to prefer whenever foreign embassies may be necessary. But under no latitude of construction could the term ‘ambassadors,’ comprehend consuls. Yet it was found necessary by Congress to employ the inferior grades of ministers, and to send and receive consuls. It is true, [*644] that the mutual appointment of consuls might have *been provided for by treaty; and where no treaty existed, Congress might perhaps have had the authority under the ninth article of the confederation, which conferred a general authority to appoint officers for managing the general affairs of the United States. But the admission of foreign consuls into the United States, when not stipulated for by treaty, was nowhere provided for. The whole subject was full of embarrassment

(n) Story on the Constitution of the United States, (Amer. 2nd Edit.,) vol. ii. pp. 356, *et seq.*

and constitutional doubts ; and the provision in the constitution, extending the appointment to other public ministers and consuls, as well as to ambassadors, is a decided improvement upon the confederation.

“§ 1560. The next section of the second article is : ‘He (the president) shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them ; and, in case of a disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed ; and shall commission all the officers of the United States.’

“§ 1565. The next power is to receive ambassadors and other public ministers. This has been already incidentally touched. A similar power existed under the confederation ; but it was confined to receiving ‘ambassadors,’ which word, in a strict sence, (as has been already stated,) comprehends the highest grade only of ministers, and not those of an inferior character. The policy of the United States would ordinarily prefer the employment of the inferior grades ; and therefore the description is properly enlarged, so as to include all classes of ministers. Why the receiving of consuls was not also expressly mentioned, as the appointment of them is in the preceding clause, is not easily to be accounted for, especially as the defect of the confederation on this head was fully understood. The power, however, may be fairly inferred from other parts of the constitution ; and indeed seems a general incident to the executive authority. It has constantly been exercised without objection ; and foreign consuls have never been allowed to discharge any functions of office, until they have received the exequatur of the president. Consuls, indeed, are not diplomatic functionaries, or political representatives of a foreign nation ; but are treated in the character of mere commercial agents.

“§ 1568. As incidents to the power to receive ambassadors and foreign ministers, the president is understood to possess the power to refuse them, and to dismiss those who, having been received, become obnoxious to censure, or unfit to be allowed the privilege by their improper conduct, or by political events. While, *however, they are permitted to remain as public functionaries, they are entitled to all the immu- [*645] nities and rights which the Law of Nations has provided at once for their dignity, their independence, and their inviolability.

“§ 1569. There are other incidental powers belonging to the executive department, which are necessarily implied from the nature of the functions which are confided to it. Among these must necessarily be included the power to perform them without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office ; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to

his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive. But he has no authority to control other officers of the Government in relation to the duties imposed upon them by law, in cases not touching his political powers.

“§ 1658. The next clause extends the judicial power ‘to all cases affecting ambassadors, other public ministers, and consuls.’ The propriety of this delegation of power to the national judiciary will scarcely be questioned by any persons, who have duly reflected upon the subject. There are various grades of public ministers, from ambassadors (which is the highest grade) down to common resident ministers, whose rank, and diplomatic precedence, and authority, are well known, and well ascertained in the law and usages of nations. But whatever may be their relative rank and grade, public ministers of every class are the immediate representatives of their Sovereigns. As such representatives, they owe no subjection to any laws, but those of their own country, any more than their Sovereign; and their actions are not generally deemed subject to the control of the private law of that State, wherein they are appointed to reside. He, that is subject to the coercion of laws, is necessarily dependent on that Power, by whom those laws were made. But public ministers ought, in order to perform their duties to their own Sovereign, to be independent of every Power, except that by which they are sent; and, of consequence, ought not to be subject to the mere municipal law of that nation, wherein they are to exercise their functions. The rights, the powers, the duties, and the privileges of public ministers are, therefore, to be determined, not by any municipal constitutions, but by the law of nature and nations, which is equally obligatory upon all Sovereigns and all States. What these rights, powers, duties, and privileges are, are inquiries properly belonging to a treatise on the Law of Nations, and need not be discussed here. But it is obvious, that every [*646] question, in *which these rights, powers, duties, and privileges are involved, is so intimately connected with the public peace, and policy, and diplomacy of the nation, and touches the dignity and interest of the Sovereigns of the ministers concerned so deeply, that it would be unsafe that they should be submitted to any other than the highest judicature of the nation.

“§ 1659. It is most fit, that this judicature should, in the first instance, have original jurisdiction of such cases, so that, if it should not be exclusive, it might at least be directly resorted to, when the delays of a procrastinated controversy in inferior tribunals might endanger the repose, or the interests of the Government. It is well known, that an arrest of the Russian Ambassador in a civil suit in England, in the reign of Queen Anne, was well nigh bringing the two countries into open hostilities; and was atoned for only by measures which have been deemed, by her own writers, humiliating. On that occasion, an act of Parliament was passed, which made it highly penal to arrest any ambassador, or his domestic servants, or to seize or distrain his goods; and this act elegantly engrossed and illuminated, accompanied by a letter from the Queen, was sent by an ambassador extraordinary, to propitiate the offended Czar.

And a statute to the like effect exists in the criminal code established by the first Congress, under the Constitution of the United States.

“§ 1660. Consuls, indeed, have not in strictness a diplomatic character. They are deemed as mere commercial agents; and therefore partake of the ordinary character of such agents; and are subject to the municipal laws of the countries where they reside. Yet, as they are the public agents of the nation to which they belong, and are often entrusted with the performance of very delicate functions of State, and as they might be greatly embarrassed by being subject to the ordinary jurisdiction of inferior tribunals, state and national, it was thought highly expedient to extend the original jurisdiction of the Supreme Court to them also. The propriety of vesting jurisdiction, in such cases, in some of the national Courts seems hardly to have been questioned by the most zealous opponents of the Constitution. And in cases *against* ambassadors, and other foreign ministers, and consuls, the jurisdiction has been deemed exclusive.

“§ 1661. It has been made a question whether this clause, extending jurisdiction to all cases *affecting* ambassadors, ministers, and consuls, includes cases of indictments found against persons for offering violence to them, contrary to the statute of the United States punishing such offence. And it has been held that it does not. Such indictments are mere public prosecutions, to which the United States and the offender only are parties; and which are conducted by the United States for the purpose of vindicating their own laws and the Law of Nations. They are [*647] *strictly, therefore, cases affecting the United States; and the minister himself, who has been injured by the offence, has no concern in the event of the prosecution, or the costs attending it. Indeed, it seems difficult to conceive how there can be a case affecting an ambassador, in the sense of the Constitution, unless, he is a party to the suit on record, or is directly affected and bound by the judgment.

“§ 1662. The language of the Constitution is, perhaps, broad enough to cover cases where he is not a party, but may yet be affected in interest. This peculiarity in the language has been taken notice of in a recent case, by a Supreme Court. ‘If a suit be brought against a foreign minister,’ (said Mr. Chief Justice Marshall, in delivering the opinion of the Court,) ‘the Supreme Court alone has original jurisdiction; and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit; but the actual defendant pleads to the jurisdiction of the Court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed; not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This Court can take cognizance of all cases ‘affecting’ foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national

Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.'”

[*648]

*No. 7.

DECISIONS IN THE FRENCH COURTS.

*Consul, when Diplomatic Agent.**Tribunal Civil de la Seine (I Chambre.)*

(Présidence de M. Barbou.)

Audience du 1 Décembre.

DROIT INTERNATIONAL.—CONSUL ETRANGER.—INVOLABILITE DES AGENS DIPLOMATIQUES.(o)

Les relations internationales ne peuvent être entravées dans un intérêt privé.

Le décret du 13 ventose an II., qui consacre l'inviolabilité des agents diplomatiques, s'applique à tous les agents diplomatiques sans distinction, alors même qu'il s'agit d'un agent diplomatique non accrédité en France, et qui traverse le territoire pour se rendre à son poste.

“UN décret du 13 ventose an II. garantit en principe l'inviolabilité des agents diplomatiques sans distinction. Cependant M. Begley, consul des Etats-Unis près le gouvernement Sarde, à la résidence de Gênes, a été arrêté dernièrement à Paris au moment où, traversant cette ville, il se rendait à son poste, et il a été incarcéré dans la maison pour dettes en vertu d'une ordonnance rendue sur la requête de M. Piedana, créancier de M. Begley. Aux termes d'un jugement emportant contrainte par corps, et rendu par un tribunal des Etats-Unis, M. Begley demandait aujourd'hui sa mise en liberté en se prévalant de sa qualité d'agent diplomatique.

“M^e Dubrena, avocat de M. Begley, a prétendu, en invoquant la loi du 13 ventose an II., que la qualité d'agent diplomatique qui appartient à M. Begley aurait dû le mettre à l'abri d'une arrestation, car cette qualité, inséparable de la personne, la suit dans tous les lieux où elle réside, et même dans le pays où l'agent n'est pas accrédité et où il n'exerce pas ses fonctions. L'avocat établissait la qualité d'agent diplomatique de M. Begley en lisant une lettre de M. le ministre des affaires étrangères adressée à M. le procureur du Roi, et dans laquelle, protestant contre l'arrestation et l'incarcération de M. Begley, il reconnaît à M. Begley la qualité de consul des Etats-Unis à Gênes.

[*649] “M^e Baroche, au nom de M. Piédana, créancier incarcérateur, *a soutenu que le décret du 13 nivose an II. ne pouvait s'appliquer qu'aux agents diplomatiques accrédités en France, et non aux agents

sans caractère officiel qui peuvent traverser le territoire. Il a soutenu, en second lieu, qu'un consul, comme M. Begley prétend l'être ne saurait être considéré comme un agent diplomatique inviolable aux termes du décret de nivose an II. Il ajoutait que le passeport délivré à M. Begley ne lui accordait d'autre titre que celui de citoyen des Etats-Unis.

“ Le Tribunal, sur les conclusions conformes de M. l'avocat du Roi, Gouin, a prononcé en ces termes :—

“ ‘ Attendu que les relations internationales ne sauraient être entravées dans un intérêt privé ;

“ ‘ Attendu que sous la dénomination générale d'agens diplomatiques se trouvent compris tous les agens ayant caractère officiel émané d'un souverain étranger pour servir d'intermédiaire dans les relations de nation à nation ;

“ ‘ Attendu que Begley, en reproduisant une lettre du ministère des affaires étrangères de France, qui lui reconnaît la qualité de consul des Etats-Unis à Gênes et de porteur de dépêches diplomatiques, justifie suffisamment de sa qualité d'agent diplomatique ;

“ ‘ En ce qui touche la demande afin d'exécution provisoire du présent jugement ;

“ ‘ Attendu que l'exécution provisoire doit être fondée par un titre ;

“ ‘ Attendu que Begley, en justifiant de sa qualité d'agent diplomatique qui seule doit faire ordonner sa mise en liberté, justifie du seul titre qui puisse être exigé en pareille matière ;

“ ‘ Ordonne la mise en liberté de Begley, et l'exécution provisoire du jugement sur minute et avant l'enregistrement. ’ ”

Wife of Ambassador.

Cour Royale de Paris (III^e Chambre.)

(Présidence de M. Simonneau.)

Audience du 21 Août.

AMBASSADRICE.—IMMUNITES DE L'AMBASSEADEUR.—ACTION PERSONNELLE.—INCOMPETENCE DES TRIBUNAUX FRANÇAIS. (p)

1^o *La femme d'un ambassadeur jouit-elle des immunités attachées à la personne de l'ambassadeur et à l'hôtel de l'ambassade ?* (Oui.)

2^o *Les personnes qui jouissent de ces immunités peuvent-elles y renoncer, et peut-on exciper contre elles d'actes qui impliqueraient cette renonciation.* (Non.)

*“ Que la femme d'un ambassadeur jouisse des immunités attachées à la personne de son mari, c'est ce qui ne peut être [*650] douteux, car les immunités couvrant toutes les personnes de la suite de l'ambassadeur et qui habitent l'hôtel de l'ambassade, à plus forte raison doivent-elles protéger la femme et les enfans de celui-ci. Mais ce qui faisait difficulté dans l'espèce, c'était, d'une part, que la Baronne de

Pappenheim n'habiterait pas l'hôtel de l'ambassade, circonstance que le Tribunal de commerce avait considérée comme établie et qu'il avait visée dans son jugement; et, d'autre part, que la Baronne de Pappenheim avait formé opposition au jugement qui l'avait condamnée au paiement des traités et avait elle-même cité son adversaire devant le Tribunal, d'où l'on tirait contre elle la conséquence qu'elle en avait reconnu la compétence.

“ Mais sur le premier point, le fait de l'habitation séparée de la Baronne de Pappenheim fût-il justifié, ne la privait pas du droit de tirer les conséquences résultant de son domicile de droit à l'hôtel de l'ambassade, la femme ne pouvant avoir d'autre domicile que celui de son mari.

“ Sur le second point, la citation par elle donnée devant le Tribunal de Commerce pour voir statuer sur l'opposition par elle formée au jugement au fond, était d'autant moins une reconnaissance de la compétence du Tribunal, qu'en même temps appel était interjeté par elle du jugement sur la compétence.

“ La Cour a prononcé en ces termes.

“ La Cour,

“ Considérant que le Baron de Pappenheim est ministre du Grand Duc de Hesse-Darmstadt, résidant en France; qu'à ce titre il jouit des immunités accordées par le droit international aux ministres des puissances étrangers; que la Baronne de Pappenheim, sa femme, jouit des mêmes immunités; que ces immunités sont d'ordre public; que ceux qui en jouissent comme représentant leur gouvernement ne peuvent y renoncer, et qu'on ne peut exciper contre eux d'aucun acte par lequel ils auraient consenti à s'en dépouiller;

“ Qu'ainsi le Tribunal de Commerce était incompétent pour connaître d'une action personnelle dirigée contre la Baronne de Pappenheim; que cette incompétence étant d'ordre public, elle peut être proposée en tout état de cause, et ne saurait être couverte par le consentement que l'appelante aurait donné à plaider devant le Tribunal;

“ Annule le jugement comme incompétemment rendu.

“(Plaidans : Mes Devesvres, pour la Baronne de Pappenheim, appelante, et Maud'heux pour Tircin, int.—Conclusions conformes de M. Berville, premier avocat-général.”)

*APPENDIX VI. (PAGE 258. Ss. clxii. cclx.) [*651]

CONSULS.

No. 1.

Treaty respecting Consuls, between the United States of North America and France (14th November, 1788.)

Convention entre le Roi Très-Chrétien et les Etats-Unis de l'Amérique, à l'effet de déterminer et fixer les fonctions et prérogatives des Consuls et Vice-Consuls respectifs, signée à Versailles le 14 Novembre, 1788.(q)

SA Majesté le Roi Très-Chrétien, et les Etats-Unis de l'Amérique, s'étant accordés mutuellement par l'article XXIX. du traité d'amitié et de commerce conclu entr'eux, la liberté de tenir dans leurs Etats et ports respectifs, des *Consuls* et *Vice-Consuls*, agens et commissaires, et voulant en conséquence *déterminer* et *fixer*, d'une manière réciproque et permanente, les *fonctions* et *prérogatives des Consuls* et *Vice-Consuls* qu'ils ont jugé convenables d'établir de préférence, Sa Majesté Très-Chrétienne a nommé le Sieur Comte de Montmorin de St. Herent, Maréchal de ses camps et armées, chevalier de ses ordres et de la toison d'or, son conseiller en tous ses conseils, ministre et secrétaire d'Etat et de ses commandemens et finances, ayant le département des affaires étrangères; et les Etats-Unis ont nommé le Sieur Thomas Jefferson, citoyen des Etats-Unis de l'Amérique, et leur ministre plénipotentiaire auprès du Roi, lesquels, après s'être communiqué leurs pleinpouvoirs respectifs, sont convenu de ce qui suit :—

Article I.

“Les *Consuls* et *Vice-Consuls* nommés par le Roi Très-Chrétien et les Etats-Unis seront tenus de présenter leurs provisions selon la forme qui se trouvera établie respectivement par le Roi Très-Chrétien dans ses Etats, et par le Congrès dans les Etats-Unis. On leur délivrera sans aucuns fraix l'*exequatur* nécessaire à l'exercice de leurs fonctions, et sur l'exhibition qu'ils seront du dit *exequatur*; les gouverneurs, commandans, chefs de justice, les corps tribunaux ou autres officiers ayant autorité dans les ports et lieux de leurs consulats les y feront jouir aussitôt et sans difficulté des prééminences, autorité, et privilèges accordés réciproquement, sans qu'ils puissent exiger des *dits *Consuls* et *Vice-Consuls* aucun droit sous aucun prétexte quelconque. [*652]

Article II.

“Les *Consuls* et *Vice-Consuls* et les personnes attachées à leurs fonctions, savoir, leurs chanceliers et secrétaires, jouiront d'une pleine et entière *immunité* pour leur chancellerie et les papiers qui y seront renfermés. Ils seront exemts de tout service personnel, logement des gens de guerre, milice, guet, garde, tutelle, curatelle, ainsi que de tous

droits, taxes, impositions et charges quelconques, à l'exception seulement des biens meubles et immeubles dont ils seraient propriétaires ou possesseurs, lesquels seront assujettis aux taxes imposées sur ceux de tous autres particuliers, et à tous égards ils demeureront sujets aux loix du pays comme les nationaux. Ceux de dits Consuls et Vice-Consuls qui feront le commerce seront respectivement assujettis, à toutes les taxes, charges et impositions établies sur les autres négocians. Ils placeront sur la porte extérieure de leurs maisons les *armes* de leur souverain, sans que cette marque distinctive puisse donner aux dites maisons le droit d'asile, soit pour des personnes, soit pour des effets quelconques.

Article III.

“Les Consuls et Vice-Consuls respectifs pourront établir des *agens* dans les différens ports et lieux de leurs départemens où le besoin l'exigera; ces agens pourront être choisis parmi les négocians nationaux ou étrangers, et munis de la commission de l'un des dits Consuls. Ils se renfermeront respectivement à rendre aux commerçans, navigateurs et bâtimens respectifs tous les services possibles, et à informer le Consul le plus proche des besoins des dits commerçans, navigateurs et bâtimens, sans que les dits agens puissent autrement participer aux immunités, droits et privilèges attribués aux Consuls et Vice-Consuls, et sans pouvoir, sous aucun prétexte que ce soit, exiger aucun droit ou émolument quelconque des dits commerçans.

Article IV.

“Les Consuls et Vice-Consuls respectifs pourront établir une *chancellerie* où seront déposés les délibérations, actes et procédures consulaires, ainsi que les testamens, obligations, contrats et autres actes faits par les nationaux ou entr'eux, et les effets délaissés par mort ou sauvés des naufrages. Ils pourront en conséquence commettre à l'exercice de la dite chancellerie des personnes capables, les recevoir, leur faire prêter serment, leur donner la garde du sceau et le droit de sceller les commissions, jugemens et autres actes consulaires, ainsi d'y remplir les fonctions de notaire et greffier du consulat.

Article V.

“Les Consuls et Vice-Consuls respectifs auront le *droit exclusif* de [653] *recevoir* dans leur chancellerie, ou à bord des bâtimens, *les *déclarations et tous les autres actes que les capitaines, patrons, équipages, passagers et négocians de leur nation voudront y passer même leur testament* et autres dispositions de dernière volonté, et les dispositions des dits actes dûment légalisés par les dits Consuls ou Vice-Consuls, et munis du sceau de leur consulat, feront foi en justice comme le feraient les originaux dans tous les tribunaux des Etats du Roi Très-Chrétien et des Etats-Unis. Ils auront aussi, et exclusivement, en cas d'absence d'exécuteur testamentaire, curateur ou héritiers légitimes, le droit de faire l'inventaire, la liquidation, et de procéder à la vente des effets mobiliers de la succession des sujets ou citoyens de leur nation qui viendront à mourir dans l'étendue de leur consulat. Ils y procéderont

avec l'assistance de deux négocians de leur dite nation, ou à leur défaut, de tout autre à leur choix, et feront déposer dans leur chancellerie les effets et papiers des dites successions, sans qu'aucuns officiers militaires, de justice, ou de police du pays, puissent les y troubler, ni y intervenir de quelque manière que ce soit; mais les dits Consuls et Vice-Consuls ne pourront faire la délivrance des successions et de leur produit aux héritiers légitimes, ou à leurs mandataires, qu'après avoir fait acquitter toutes les dettes que les défunts auront pu avoir contractées dans le pays, à l'effet de quoi les créanciers auront droit de saisir les dits effets dans leurs mains, de même que dans celles de tout autre individu quelconque, et en poursuivre la rente jusqu'au paiement de ce qui leur sera légitimement dû, lorsque les dettes n'auront été contractées par jugement, par acte ou par billet dont la signature sera reconnue, le paiement ne pourra en être ordonné qu'en fournissant par le créancier caution suffisante et domiciliée de rendre les sommes induement perçues, principal, intérêts et fraix; lesquelles cautions cependant demeureront duement déchargées après une année, en tems de paix, et deux, en tems de guerre, si la demande en décharge ne peut être formée avant ces délais contre les héritiers qui se présenteront. Et afin de ne pas faire injustement attendre aux héritiers les effets du défunt, les Consuls et Vice-Consuls feront annoncer sa mort dans quelqu'une des gazettes qui se publient dans l'étendue de leur consulat, et qu'ils retiendront les dits effets sous leurs mains pendant quatre mois, pour répondre à toutes les demandes qui se présenteront: et ils seront tenus, après ce délai de délivrer aux héritiers l'excédant du montant des demandes qui auront été formées.

Article VI.

“Les Consuls et Vice-Consuls respectifs recevront les déclarations, protestations et rapports de tous capitaines et patrons de leur nation respective pour raison d'*avaries* essayées à la mer, et les capitaines et patrons remettront dans la chancellerie des dits Consuls et Vice-Consuls les actes qu'ils auront fait dans d'autres *ports pour accidens qui leur seront arrivés pendant leur voyage. Si un sujet du Roi Très-Chrétien et un habitant des Etats-Unis, ou un étranger, sont intéressés dans la dite cargaison, l'avarie sera réglée par les tribunaux du pays, et non par les Consuls et Vice-Consuls, mais lorsqu'il n'y aura d'intéressés que les sujets ou citoyens de leur propre nation, les Consuls ou les Vice-Consuls respectifs nommeront des experts pour régler les dommages et avaries. [*654]

Article VII.

“Dans le cas où, par tempête ou autres accidens, des vaisseaux ou bâtimens Français échoueront sur les côtes des Etats-Unis, et des vaisseaux et bâtimens, des Etats-Unis échoueront sur les côtes des Etats de Sa Majesté Très-Chrétienne, le Consul ou le Vice-Consul, le plus proche du lieu du naufrage, pourra faire tout ce qu'il jugera convenable, tant pour sauver le dit vaisseau ou bâtiment, son chargement et appartenances, que pour le magasinage et la sûreté des effets sauvés et marchandises. Il pourra en faire l'inventaire, sans qu'aucuns officiers militaires, des douanes, de justice ou de police du pays, puissent s'y immiscer autrement que pour

faciliter aux Consuls et Vice-Consuls, capitaine et équipage du vaisseau naufragé ou échoué, tous les secours et faveurs qu'ils leur demanderont, soit pour la célérité et la sûreté du sauvétage et des effets sauvés, soit pour éviter tous désordres. Pour prévenir même toute espèce de conflit et de discussion dans les dits cas de naufrage, il a été convenu que lorsqu'il ne se trouvera pas de Consul ou Vice-Consul pour faire travailler au sauvétage, ou que la résidence du dit Consul ou Vice-Consul, qui ne se trouvera pas sur le lieu du naufrage, sera plus éloignée du dit lieu que celle du juge territorial compétent, ce dernier fera procéder sur le champ avec toute la célérité, la sûreté et les précautions prescrites par les loix respectives, sauf au dit juge territorial à se retirer, le Consul ou Vice-Consul lui fera rembourser les fraix, ainsi que ceux du sauvétage. Les marchandises et effets sauvés devront être déposés à la douane ou autre lieu de sûreté les plus prochain avec l'inventaire qui en aura été dressé par le Consul ou Vice-Consul, ou en leur absence par le juge qui en aura connu pour les dits effets et marchandises être ensuite délivrés après le prélèvement des fraix, et sans forme de procès, aux propriétaires, qui, munis de la mainlevée du Consul ou Vice-Consul le plus proche, les réclameront par eux-mêmes, ou par leurs mandataires soit pour réexporter les marchandises, et dans ce cas celles ne payeront aucune espèce de droits de sortie, soit pour les rendre dans le pays, si elles n'y sont pas prohibées; et dans ce dernier cas les dites marchandises se trouvant avariées, on leur accordera une modération sur les droits d'entrée, proportionnée au dommage souffert, lequel sera constaté par le procès verbal dressé lors du naufrage ou l'échouement.

[*655]

*Article VIII.

“Les Consuls ou Vice-Consuls exerceront la *police* sur tous les bâtimens de leurs nations respectives, et auront à bord des dits bâtimens tout pouvoir et juridiction en matière civile dans toutes les discussions qui pourront y survenir; ils auront une entière inspection sur les dits bâtimens, leurs équipages et les changemens et remplacements à y faire, pour quel effet ils pourront se transporter à bord des dits bâtimens toutes les fois qu'ils le jugeront nécessaire; bien entendu que les fonctions ci-dessus énoncées seront concentrées dans l'intérieur des bâtimens, et qu'elles ne pourront avoir lieu dans aucun cas qui aura quelque rapport avec la police des ports où les dits bâtimens se trouveront.

Article IX.

“Les Consuls et Vice-Consuls pourront faire *arrêter* les capitaines, officiers, mariniers, matelots et toutes autres personnes faisant partie des équipages des bâtimens de leurs nations respectives qui auraient *déserté* des dits bâtimens, pour les renvoyer et faire transporter hors du pays. Auquel effet les dits Consuls et Vice-Consuls s'adresseront aux tribunaux, juges et officiers compétens et leur feront, par écrit, la demande des dits déserteurs, en justifiant par l'exhibition des régîtres du bâtiment ou rôle d'équipage, que ces hommes faisaient partie des susdits équipages. Et sur cette demande, ainsi justifiée, sauf toutefois la preuve contraire, l'extradition ne pourra être refusée, et il sera donné toute aide

et assistance aux dits Consuls et Vice-Consuls pour la recherche, saisie et arrestation des susdits déserteurs, lesquels seront même détenus et gardés dans les prisons du pays, à leur réquisition et à leurs fraix, jusqu'à ce qu'ils aient trouvé occasion de les renvoyer. Mais s'ils n'étaient renvoyés dans le délai de trois mois, à compter du jour de leur arrêt, ils seront élargis, et ne pourront plus être arrêtés pour la même cause.

Article X.

“ Dans le cas où les sujets ou citoyens respectifs auront commis quelque *crime ou infraction de la tranquillité publique*, ils seront justiciables des juges du pays.

Article XI.

“ Lorsque les *dits coupables* seront partie de l'équipage de l'un des bâtimens de leur nation, et se seront retirés à bord des dits navires, ils pourront y être saisis et arrêtés par l'ordre des juges territoriaux : ceux-ci en prévientront le Consul ou Vice-Consul, lequel pourra se rendre à bord s'il le juge à propos : mais cette prévenance ne pourra en aucun cas retarder l'exécution de l'ordre dont il est question. Les personnes arrêtées ne pourront ensuite être mises en liberté qu'après que le Consul ou Vice-Consul en *aura été prévenu, et elles lui seront remises, [*656] s'il le requiert, pour être reconduites sur les bâtimens où elles auront été arrêtées ou autres de leurs nation, et être renvoyées hors du pays.

Article XII.

“ Tous *différens et procès* entre les sujets du Roi Très-Chrétien dans les Etats-Unis, ou entre les citoyens des Etats-Unis dans les Etats du Roi Très-Chrétien, et notamment toutes les discussions relatives aux salaires et conditions des engagemens des équipages des bâtimens respectifs, et tous différens de quelque nature qu'ils soient, qui pourraient s'élever entre les hommes des dits équipages, ou entre quelques uns d'eux et leurs capitaines, ou entre les capitaines de divers bâtimens nationaux, seront terminés par les Consuls et Vice-Consuls respectifs, soit par un renvoi par devant des arbitres, soit par un jugement sommaire, et sans fraix. Aucun officier territorial, civil ou militaire, ne pourra y intervenir, ou prendre une part quelconque à l'affaire, et les appels de dits jugemens consulaires seront portés devant les tribunaux de France ou des Etats-Unis qui doivent en connaître.

Article XIII.

“ L'utilité générale du commerce ayant fait établir dans les Etats du Roi Très-Chrétien des *tribunaux* et des formes particulières pour accélérer la décision des affaires de commerce, les négocians des Etats-Unis jouiront du bénéfice de ces établissemens et le Congrès des Etats-Unis pourvoira de la manière la plus conforme à ses lois, à l'établissement des avantages équivalens en faveur des négocians Français pour la prompte expédition et décision des affaires de la même nature.

Article XIV.

“ Les sujets du Roi Très-Chrétien et les citoyens des Etats-Unis, qui
DECEMBER, 1855.—31

justifieront authentiquement être du corps de la nation respective, jouiront en conséquence de *l'exemption de tout service personnel* dans le lieu de leur établissement.

Article XV.

“ Si *quelqu'autre nation* acquiert, en vertu d'une convention quelconque, un *traitement plus favorable* relativement aux prééminences, pouvoirs, autorités et privilèges consulaires, les Consuls et Vice-Consuls du Roi Très-Chrétien ou des Etats-Unis *réci-proquement y participeront*, aux termes stipulés par les articles II., III. et IV. du traité d'amitié et de commerce conclu entre le Roi Très-Chrétien et les Etats-Unis.

Article XVI.

“ La présente convention aura son plein effet pendant *l'espace de douze ans*, à compter du jour de l'échange des ratifications, *lesquelles [*657] seront données en bonne forme et échangées de part et d'autre dans l'espace d'un an, ou plus tôt si faire se peut.

“ En foi de quoi, nous Ministres Plénipotentiaires avons signé la présente convention, et y avons fait apposer le cachet de nos armes.

“ Fait à *Versailles*, le 14 Novembre, mil sept cent quatre-vingt-huit.

“ (L. S.) Le Comte de Montmorin de St. Herent.

“ (L. S.) Th. Jefferson.”

No. 2.

Spain.—Ordonnance respecting Foreign Consuls.

Ordonnance de S. M. Catholique relative aux Consuls et Vice-Consuls étrangers en Espagne, publiée à Madrid le 8 Mai, 1827.(r)

“ ART. I. Aucun consul ou vice-consul étranger ne pourra exercer dans le port d'Espagne de sa résidence, aucun acte de juridiction, attendu que ce droit appartient aux autorités locales, desquelles ils réclameront au besoin la protection qu'on doit leur accorder d'après la loi.

“ Art. II. Aucun consul ou vice-consul étranger ne sera empêché par les autorités locales de recevoir et légaliser des protestations d'avarie et autres documens extra-judiciaires qui appartiennent à son emploi, lorsqu'ils émaneront des sujets de sa nation.

“ Art. III. Dans les affaires contentieuses et dans toutes les autres où ils auront à solliciter le pouvoir coërcitif des autorités locales, où il faudra employer quelques formalités judiciaires, la représentation des consuls et vice-consuls étrangers se bornera uniquement à celle de simples agens des sujets de leurs nations respectives.

“ Art. IV. Les autorités locales abrègeront, autant que cela sera compatible avec la droite administration de la justice, le cours judiciaire et la conclusion des procès et des contestations qui s'élèveront parmi les sujets des autres nations, afin de leur éviter les préjudices, que les lenteurs pourroient apporter.

“Art. V. Les autorités observeront très-exactement les traités et les conventions en vigueur entre l’Espagne et les autres nations, [*658]
*relativement aux demandes et droits déduits par les sujets étrangers.

“Art. VI. La juridiction particulière que les autorités locales exerceront dans ces cas sera exactement réglée sur la loi 6, du titre II., livre 6, de la Novissima Recopilacion.

“Art. VII. Les consuls et vice-consuls étrangers jouiront en Espagne du caractère et de la considération publique que leur assigne la même loi.

“Art. VIII. Encourront le mécontentement du Roi les autorités qui, par leur omission et leur négligence, donneroient lieu à ce qu’on introduise le moindre abus, soit en tolérant aux consuls ou vice-consuls la latitude qu’ils n’auroient pas dans leurs fonctions privatives, soit en dépouillant les Tribunaux de celles qui leur appartiennent, au préjudice du pouvoir suprême du Roi notre Seigneur et de la juridiction qu’il a daigné leur déléguer.

“*Madrid le 8 Mai, 1827.*

“Signé: LOUIS-LOPEZ BALLESTEROS.”

No. 3.

Prussian Rescript, relating to the Authority of English Consuls in matters of Sea Protests of English Subjects.

“K. Preuss. Rescript vom 28 August, 1834, betreffend die Befugniß der Englischen Consuln zur Aufnahme von See-Protesten.(s)

““DEM Königlichen Kommerz- und Admiralitäts-Kollegium wird in Bezug auf die in dessen Bericht vom 27 Mai d. J. begutachtete Frage :

“In wiefern den Englischen Consuln in Fällen, wo es nur auf das Interesse Englischer Unterthanen ankommt, die Aufnahme von Seeprotesten zu gestatten ist?
von dem Justizminister, im Einverständnisse mit den Königlichen Ministerien für die Gesetzrevision, so wie der Finanzen und der auswärtigen Angelegenheiten Nachstehendes hierdurch eröffnet.

““Es unterliegt keinem Bedenken, dass nach den Grundsätzen des Völkerrechts diejenigen Rechte, welche den in England angestellten Preussischen Consuln diessseits verliehen und ihnen von der Englischen Regierung zugestanden worden sind, auch den in Preussen fungirenden Englischen Consuln von Preussischer *Seite bewilligt werden müssen. Von diesem Gesichtspunkte ausgegangen kommt es [*659]
lediglich auf die Untersuchung der Frage an: “Welche Befugnisse in Betreff der Seeproteste den Preussischen Consuln nach den für sie gegebenen speciellen Verordnungen zustehen?”

““Das Consulats-Reglement vom 18 September, 1796, hat in dieser Beziehung ausdrücklich Folgendes festgesetzt :

“(1) Bei Havarie oder kleinen Seeschäden soll der Consul die am Schiffe vorgefallenen Schäden und die zum Besten der Reise, des Schiffs and der Ladung verwendeten Kosten verificiren. Insbesondere soll er hierzu bei kleinen oder ordentlichen und bei particulären Havarien verpflichtet sein, insofern bei diesen der Schaden nicht in's Grosse geht.

“(2) Was aber grosse gemeinschaftliche oder ausserordentliche Havarien betrifft, so gilt für diese, so wie für Strandungen, bei welchen ein Schiff verunglückt, dasjenige, was bereits in der Assecuranz-Ordnung vom 18 Februar, 1766, dahin festgesetzt ist; “dass die von Schiffen erlittenen Schäden am Orte, wo das Unglück sich zugetragen, von kunsterfahrenen Taxatoren oder in deren Ermangelung von glaubhaften Männern gewürdigt werden, diese aber ihre Taxe avor der Ortsobrigkeit oder vor Notar und Zeugen oder auch vor dem Consul beschwören, dass geborgene Waaren ebenmässig von einer der nämlichen Behörden taxirt werden, und dass die Schiffer nach einem unterwegs in einem Nothfalle zur Rettung des Schiffes gethanen Seewurf dem Consul den Schaden und den Betrag der geworfenen Güter nebst der ganzen Bewandniss des Nothfalles genau und umständlich angeben sollen.”

“Nach diesen Bestimmungen erscheint es nicht zweifelhaft, dass den Preussischen Consuln das Recht zusteht, Seeproteste und damit verknüpfte Taxen aufzunehmen, und zwar ohne Rücksicht darauf, ob an ihren Residenzorten Seegerichte vorhanden sind oder nicht.

“Allein in Ansehung des Strandungsfalles wird im § 3, sub. A des Consulats-Reglements noch besonders disponirt:

“Derselbe (der Consul) hat auch dafür zu sorgen, dass von der dortigen Obrigkeit, oder, Falls sich dieselbe etwa damit nicht befassen sollte, von ihm selbst, nicht allein dem Schiffer und dem Schiffsvolk eine solenne Erklärung oder Deposition von allen und jeden Umständen des Unglücksfalles abgenommen, und solche gebührend protokolliert, sondern auch über Alles, was geborgen ist, ein genau richtiges Inventarium aufgenommen werde.”

“Aus den Worten: von der Obrigkeit, oder, Falls sich dieselbe damit nicht befassen sollte, von ihm selbst, könnte man die Folgerung ziehen, dass die Befugniss der Consuln zur Aufnahme von Seeprotesten und den damit zusammenhängenden Akten [660] nur dann eintrete, wenn Seegerichte nicht vorhanden *sind, und dass daher die allegirten Vorschriften des A. L. R. so wie des Consulats-Reglements überhaupt die Seegerichte als die zur Aufnahme der in Rede stehenden Verhandlungen eigentlich ausschliesslich competente Behörde constituirten, und die Consuln nur eventualiter an deren Stelle setzten.

“Allein abgesehen davon, dass diese Auslegung dem deutlichen Wortsinn jener Allegate nicht entsprechen würde, so ist auch zu erwägen, dass das Consulats-Reglement nicht sowohl die Befugnisse, als die Verpflichtungen der Consuln hat festsetzen wollen.

“Es folgt daher aus den Worten:
Der Consul soll dafür sorgen, dass von der Orts-Obrigkeit oder,

Falls dieselbe sich nicht damitz zu befassen pflegte, von ihm selbst, eine solenne Deposition der Schiffsleute aufgenommen werde,

“Nichts weiter, als dass der Consul nicht absolut, sondern nur in Ermangelung von Seegerichten verpflichtet sey, eine Erklärung der Schiffsmannschaft über den Strandungsfall aufzunehmen. Eine solche bedingte Verpflichtung der Consuln zur Aufnahme der in Rede stehenden Akte schliesst nicht aus, dass die Befugniss hierzu unbedingt sey; sie modificirt diese Befugniss nur insofern, als demzufolge der Consul die Schiffer, welche sich an die Seegerichte wenden wollen, nicht nöthigen kann, die Erklärung über die Umstände der Strandung vor ihm abzugeben.

“Hierzu kommt nun noch, dass das A. L. R. hinsichtlich der Assecuranz- und Havarie-Gesetze fast gänzlich der Havarie-Ordnung vom 18 Februar, 1766, gefolgt ist, wie sich dies theils aus dem Entwurf zum A. L. R. Th. I. Abth. II. Tit. III. Abschn. 9, S. 208, ergibt, theils auch schon daraus hervorgeht, dass sehr viele (insbesondere aber die hier einschlagenden) Bestimmungen der Havarie-Ordnung fast wörtlich in das A. L. R. übergegangen sind (cf. §§ 197, 231, folg. Havar.-Ordn.) Dass aber auch das Consulats-Reglement in Ansehung der Havarien von den Dispositionen der Havarie-Ordnung nicht hat abweichen wollen, ist um deswillen unzweifelhaft, weil dasselbe ausdrücklich sagt, das in Betreff der grossen gemeinschaftlichen oder ausserordentlichen Havarie die Vorschriften der Havarie-Ordnung gelten sollten. Die letzteren stimmen nun mit den Dispositionen des A. L. R. wie erwähnt, vollkommen überein, und beschränken insbesondere die Befugniss des Consuls zur Aufnahme von Seeprotesten nicht auf den Fall, dass keine Seegerichte zugänglich seyn sollten.

“Wenn aber hiernach anzunehmen ist, dass den Preussischen Consuln im Auslande und also auch in England ein unbedingtes Recht zusteht, Seeproteste Preussischer Schiffer aufzunehmen, so kann auch nach dem oben aufgestellten Grundsatz des Völkerrechts [*661] *den Englischen Consuln in Preussen eine gleiche Befugniss in Ansehung Englischer Schiffer nicht versagt werden.

“In Gemässheit vorstehender Entwicklung ist von dem Herrn Minister der auswärtigen Angelegenheiten unterm 23. d. M. eine Note an den Königl. Grossbritannischen Gesandten hierselbst erlassen, und darin namentlich auf die Folgerungen näher hingewiesen worden, welche sich daraus ergeben, dass das qu. Recht der Englischen Consuln zur Aufnahme gültiger Seeproteste, wie schon in der obigen Frage selbst angedeutet ist, auf diejenigen Fälle beschränkt bleiben muss, in welchen der Seeprotest von dem Capitain eines Englischen Schiffes eingelegt wird und nur Englishche Unterthanen dabei theilhaft sind.’

“Vergl. v. K a m p t z Jahrbücher für die Preussische Gsetsgebung, Rechtswissenschaft und Rechtsverwaltung. Band 44, S. 75.

“Allgemeines Landrecht für die Preussischen Staaten, Theil II., Tit. 8, § 1843.”

No. 4.

Greece—Consular Regulations.

BARON DE MARTENS is of opinion that the judicial functions of the Consul are very clearly set forth in the Regulations of the Kingdom of Greece.^(t)

“ Les navires Grecs entrés dans un port étranger ne peuvent être indéfiniment considérés comme lieux étrangers, et la protection qui leur est accordée ne saurait dessaisir la juridiction territoriale pour tout ce qui touche l'intérêt de l'Etat dans les ports duquel ils se trouvent.

“ Admis dans un port étranger, ces navires sont donc soumis aux lois de police qui régissent le lieu où ils sont reçus ; et les gens de leurs équipages sont également justiciables des tribunaux du pays pour les délits qu'ils y commettraient, même à bord, *envers des personnes étrangères à l'équipage*, ainsi que pour les conventions civiles qu'ils pourraient contracter envers elles.

“ Cependant il est de droit commun, indépendamment des traités particuliers et sans qu'ils soient nécessaires, que toutes les discussions relatives aux salaires et conditions d'engagement des gens de mer, et toutes les contestations entre les gens de l'équipage, *ou entre eux et [*662] leurs capitaines, ou entre les capitaines de divers bâtiments nationaux, soient terminées par les consuls.

“ Il est également reconnu que la juridiction territoriale n'est pas compétente à l'égard des délits qui se commettent à bord *entre hommes de l'équipage* ; et que dans ce cas, comme il s'agit de la discipline intérieure du navire, l'autorité locale ne doit pas s'ingérer, toutes les fois que son secours n'est pas réclamé, ou que la tranquillité du port n'est pas compromise (ce principe est également reconnu en France par une décision du conseil d'Etat, approuvée le 20 Novembre, 1806, et par une ordonnance du 29 Octobre, 1833.)

“ Les consuls connaissent donc de tous les différends survenus, dans le ressort de leur département, entre les capitaines, matelots et autres individus embarqués sur les navires de commerce de leurs pays, sauf aux consuls à permettre aux plaignants de recourir à qui il appartiendra, suivant les circonstances, dans le cas où ils ne pourraient rendre justice par eux-mêmes.

“ Les consuls ne peuvent juger définitivement en matière criminelle que les affaires où il n'y a pas lieu de prononcer des peines *afflictives*.

“ Les peines de simple correction seront prononcées par eux conformément aux lois sur la police de la navigation. Mais s'il s'agissait d'un crime ou délit commis par quelques gens de mer, où il peut échoir des peines qui, suivant les lois de la police sur la navigation, sont censées afflictives, les inculpés seraient arrêtés et renvoyés en Grèce par le premier bâtiment Grec, etc. L'inculpé, dans ce cas, serait accompagné d'une expédition des pièces de la procédure, adressée à l'autorité Grecque du lieu de la destination.

(t) De Martens, Guide Diplomatique, t. i. pp. 245-6, n.

“ Si le prévenu s’est enfui du navire, son arrestation définitive et sa détention sont des actes de pouvoir qui ne peuvent être exécutés que par les agents de l’autorité locale. Dans cette circonstance le consul transmet sa demande par écrit aux officiers compétents, qui, après avoir prévenu la justice, lui donneront aide pour faire les recherches nécessaires et opérer l’arrestation de l’inculpé d’après les formes établies dans le lieu ou prescrites par les traités.

“ Les consuls exercent *amiablement* la juridiction sur les négociants et entre nationaux.

“ La juridiction commerciale des consuls, pour causes étrangères à la criminalité sera réglée d’après le code de commerce Français, admis en Grèce.”

*No. 5.

[*663]

DECISIONS IN THE FRENCH COURTS.

Tribunal Civil de la Seine (IV^{me} Chambre.)

(Présidence de M. Perrot de Chézelles.)

Audience du 4 Août.

CONSUL ETRANGER.—ARRESTATION PROVISOIRE.—SAISIE CONSERVATOIRE.(u)

“ M. LE COMTE D’ABAUNZA, Marquis de Fuente Hermosa, Consul de l’Uruguay, habite, depuis plusieurs années, la France en cette qualité, et s’y est marié.

“ Il est poursuivi par M. Abrassart, marchand de meubles, pour une créance s’élevant à plus de 5,000 fr.

“ M. Abrassart, se fondant sur les dispositions de la loi de 1832, relative à la contrainte par corps à l’égard des étrangers, a obtenu de M. le président du Tribunal une ordonnance, en vertu de laquelle il a fait arrêter et incarcérer son débiteur.

“ M. d’Abaunza a formé une demande en main-levée de l’écrou, et la 4^e Chambre avait à statuer sur le mérite de cette demande.

“ M^e Jules Favre s’est présenté pour la soutenir dans l’intérêt de M. d’Abaunza,

“ Il a développé à cet effet plusieurs moyens :—

“ 1^o M. d’Abaunza, comme consul, est inviolable, et ne peut être soumis à la contrainte par corps.

“ 2^o Il est étranger sans doute, mais, depuis plusieurs années il a établi son domicile en France, et c’est seulement à l’étranger non domicilié que s’applique la loi de 1832.

“ 3^o On ne peut l’assimiler à un débiteur forain, et dès-lors, une saisie conservatoire ne pouvait être pratiquée à son préjudice.

“ M^e Bochet, avocat de M. Abrassart, a combattu ces divers moyens.

(u) Gazette des Tribunaux, August 6, 1842. Numéro 4783.

“ Il a soutenu, en premier lieu, qu’il fallait, quant à l’inviolabilité de la personne, distinguer entre les ambassadeurs et les consuls : les premiers seuls sont inviolables quand ils ont été reçus et accrédités, les seconds ne le sont pas.

“ En second lieu, pour être affranchi de la contrainte par corps l’étranger doit avoir obtenu du gouvernement l’autorisation d’établir son domicile en France.

[*664] “ En troisième lieu, le débiteur étranger, qui peut d’une moment à l’autre quitter le sol qu’il habite pour transporter sa résidence ailleurs, est un véritable débiteur forain, et comme tel soumis aux dispositions de l’article 822, du Code de procédure civile.

“ M. le substitut Meynard de Frank, reproduit et discuté avec méthode et clarté les divers argumens des parties.

“ S’appuyant de l’autorité de Merlin et de celle de la jurisprudence, il a fait ressortir la différence de position qui existe entre les ambassadeurs, ministres, envoyés, résidens, chargés d’affaires, et les consuls.

“ ‘ Les consuls des nations étrangères,’ a dit ce magistrat, ‘ sont en France ce qu’ils sont dans tous les Etats de l’Europe, des protecteurs, quelquefois juges de marchands de leur nation, d’ordinaire même des marchands que l’on envoie non pour représenter leur prince auprès d’une autre Puissance souveraine, mais pour protéger leurs compatriotes en ce qui regarde le négoce, souvent aussi pour connaître et décider des différends qui peuvent s’élever entre eux au sujet de ces sortes d’affaires.

“ ‘ Il n’y a pas de consuls, même parmi ceux à qui des traités exprès attribuent la qualité de juges, qui aient, à l’instar des ambassadeurs, le caractère représentatif, d’où découle essentiellement l’indépendance de l’autorité locale.

“ ‘ Aussi, quoiqu’il soit de règle constante qu’un ambassadeur ne peut être traduit devant les Tribunaux du pays où il réside comme tel pour raison des dettes qu’il a contractées envers les habitans de ce pays, il est certain qu’il en est autrement des consuls, qui tous les jours sont cités dans nos Tribunaux à la requête des Français envers lesquels ils se sont obligés.’ (Aix, 14 Août, 1829.—Paris, 26 Mars, 1840.—28 Avril, 1841.)

“ M. l’avocat du Roi s’explique ensuite sur la seconde question relative à la manière dont l’étranger doit avoir son domicile établi en France pour échapper à la contrainte par corps.

“ Analysant et combinant d’une part les dispositions des lois de 1807 et de 1832 sur la contrainte par corps, de l’autre les diverses décisions des Cours sur l’application de ces lois, le ministère public en conclut que l’autorisation du gouvernement n’est pas rigoureusement nécessaire, et qu’il appartient aux Tribunaux d’apprécier les circonstances d’après lesquelles l’étranger doit être considéré comme ayant, ou non, son domicile en France. (Cassation, 20 Août, 1811.—6 Février, 1826.—15 Mars, 1831.)

“ M. l’avocat du Roi estime que, dans l’espèce, M. d’Abaunza qui réside en France depuis 1833, qui s’y est marié, qui y est attaché comme consul de l’Uruguay, justifie suffisamment qu’il y a son domicile, et que sous ce rapport, il doit être affranchi de contrainte par corps.

“ Il ne saurait, par la même raison, être considéré comme un débiteur forain, et dès-lors la saisie conservatoire pratiquée sur lui est nulle.

* “ Après en avoir délibéré, le Tribunal :—

“ “ Attendu que si les agens diplomatiques jouissent de cer- [*665]
taines immunités, c’est parce qu’ils représentent leur gouvernement vis-à-vis d’un autre gouvernement, mais que les simples consuls ne peuvent, sous ce rapport, prétendre à aucune assimilation, puisqu’ils ne sont que des fonctionnaires délégués pour protéger et régler les intérêts privés de leurs nationaux ;

“ “ Qu’ainsi la qualité d’agent consulaire, que réclame Carlier d’Abaunza, ne saurait l’affranchir de l’exercice des poursuites dirigées contre lui par Abrassart ;

“ “ Attendu que la résidence prolongée d’un étranger et même son mariage en France ne sauraient lui faire obtenir les droits résultant de l’établissement du domicile, qui ne peut avoir lieu que dans les termes prévus par l’article 13, du Code civil, c’est-à-dire avec l’autorisation royale ;

“ “ Que, suivant les termes de l’article 16, de la loi du 17 Avril, 1832, un établissement du commerce ou la propriété d’immeubles sur le territoire Français, qui supposent dans ces deux cas une longue résidence, n’ont pour effet que de mettre l’étranger à l’abri d’une arrestation provisoire, mais ne l’affranchissent pas de la contrainte par corps exercée dans les termes de l’article 14, de la même loi, et qui est la conséquence de la qualité d’étranger.

“ “ Déboute Carlier d’Abaunza de sa demande afin de mise en liberté et de nullité d’écrou, etc.’ ”

Cour Royale de Paris (III^{me} Chambre.)

(Présidence de M. Simonneau.)

Audience du 28 Avril.

LIQUIDATEUR CHARGE DE GERER.—ACTES DE GESTION.—ACTION PERSONNELLE.—QUALITE DE CONSUL.—CONTRAINTE PAR CORPS.(x)

- 1^o *Le liquidateur d’une société, chargé en outre de gérer et administrer l’établissement social sous sa responsabilité personnelle, est-il personnellement tenu et par corps des engagements par lui souscrits ? (Oui.)*
- 2^o *La qualité de consul d’une Puissance étrangère dont ce liquidateur serait revêtu, le soustrairait-elle à la contrainte par corps ? (Non.)*

“ AINSI jugé par l’arrêt suivant :—

“ “ La Cour, en ce qui touche l’appel principal.

* “ “ Considérant qu’Hermann Delong n’a pass été seulement [*666]
nommé liquidateur, mais qu’il a été chargé de gérer et administrer l’établissement sous sa responsabilité personnelle ; qu’il a accepté cette double mission et a fait des actes de gestion.

“ ‘En ce qui touche l'appel incident de Boullé et Filon.

“ ‘Considérant que, quand Delong justifierait de sa qualité de consul, cette qualité ne lui donnerait pas le caractère d'agent diplomatique, et qu'il ne jouirait pas des immunités accordées à ce titre ; que par conséquent, Delong peut être soumis à la contrainte par corps.

“ ‘Confirme sur l'appel principal, infirme sur l'appel incident.’

“ (Plaidans : M^e Poulain pour Hermann Delong appelant, et M^e Durand-St-Amand pour Boullé et Filon, int.)

Appeal in the Case of D'Abuanza.

Cour Royale de Paris (II^{me} Chambre.)

(Présidence de M. Algier.)

Audience du 25 Août.

CONSUL.—CONTRAINTE PAR CORPS.—DOMICILE DE L'ÉTRANGER DÉBITEUR FORAIN.(y)

- 1^o *Les consuls étrangers, sans mission diplomatique, ne participent point aux immunités dont jouissent les ambassadeurs et envoyés des Puissances étrangères ; en tous cas, ils ne peuvent exciper de leur qualité devant les Tribunaux qu'autant qu'ils ont reçu l'exequatur du gouvernement Français.*
- 2^o *Une résidence prolongée en France, un établissement par mariage, ne suffisent pas pour constituer en faveur de l'étranger un domicile légal de nature à l'affranchir de la contrainte par corps ; le domicile exigé par l'article 14, de la loi du 17 Avril, 1832, ne peut être acquis qu'aux conditions imposées par l'article 13, du Code civil.*
- 3^o *L'étranger non domicilié en France, et qui n'y possède ni immeuble, ni établissement, peut être considéré comme débiteur forain dans le lieu même où il a établi sa résidence, et est dès-lors passible de saisie conservatoire.*

“M. CARLIER D'ABAUNZA, Marquis de la Fuente Hermosa, Espagnol de naissance, habite Paris depuis 1833. Il n'a obtenu à aucune époque l'autorisation du roi d'établir son domicile en *France ; mais [*667] il s'est marié à Paris, et a continué d'y résider sans interruption. Sans profession jusqu'alors, M. Carlier d'Abaunza a été pourvu en 1840 du titre de consul-général de la république orientale de l'Uruguay, et quoiqu'il n'ait point encore obtenu d'*exequatur* du gouvernement Français, il serait en ce moment, d'après sa prétention, chargé des fonctions de ministre plénipotentiaire de l'Uruguay, en l'absence du titulaire. C'est dans ces circonstances que M. Carlier d'Abaunza a été incarcéré provisoirement en qualité d'étranger, et que le mobilier garnissant son appartement a été frappé d'une saisie conservatoire, à la requête de M. Abrassart, son tapissier, créancier d'une somme assez importante pour travaux et fournitures de son état.

“Sur la demande en condamnation et en validité de la saisie formée par le créancier, M. d'Abaunza a formé reconventionnellement une demande en nullité de l'érou et de la saisie conservatoire, se fondant 1° sur la qualité de consul-général de l'Uruguay, et sur l'inviolabilité qu'elle doit assurer à sa personne; 2° sur sa résidence prolongée en France et le domicile de fait et d'intention qu'il soutient y avoir acquis; 3° enfin, sur l'exagération du prix des fournitures et la dissimulation des à-comptes payés.

“Sur ces contestations, dont nous avons déjà rendu compte dans la *Gazette des Tribunaux*, lorsqu'elles se sont présentées en première instance, est intervenu le jugement suivant:—

“Attendu que si les agens diplomatiques jouissent de certaines immunités, c'est parce qu'ils représentent leur gouvernement vis-à-vis d'un autre gouvernement, mais que les simples consuls ne peuvent, sous aucun rapport, prétendre à aucune assimilation, puisqu'ils ne sont que des fonctionnaires délégués pour protéger et régler les intérêts privés de leurs nationaux;

“Qu'ainsi la qualité d'agent consulaire que réclame Carlier d'Abaunza ne saurait l'affranchir de l'exercice des poursuites dirigées contre lui par Abrassart;

“Attendu que la résidence prolongée d'un étranger, même son mariage en France, ne sauraient lui faire obtenir des droits résultant de l'établissement du domicile, qui ne peut avoir lieu que dans les termes prévus par l'art. 13, du Code civil, c'est-à-dire avec l'autorisation royale;

“Que suivant les termes de l'art. 16, de la loi du 17 Avril, 1832, un établissement de commerce ou la propriété d'immeubles sur le territoire Français, qui supposent dans ces deux cas une longue résidence, n'ont pour effet que de mettre l'étranger à l'abri d'une arrestation provisoire, mais ne l'affranchissent pas de la contrainte par corps exercée dans les termes de l'art. 14, de la même loi, et qui est la conséquence de la qualité d'étranger.

“En ce qui touche la saisie conservatoire formée sur le mobilier d'Abaunza;

“Attendu que sa qualité d'étranger étant établie, le sieur Abrassart *avait le droit de former une saisie conservatoire sur le mobilier de son débiteur, qui doit être considéré comme débiteur forain; [*668]

“Le Tribunal déboute Carlier d'Abaunza de sa demande en nullité d'érou; le condamne par corps à payer à Abrassart la somme de 2,700 francs, à laquelle le Tribunal réduit le montant des fournitures faites; déclare la saisie conservatoire bonne et valable, etc.’

“Appel.

“M^e Jules Favre, pour M. Carlier d'Abaunza, a soutenu que soit comme consul, soit comme étranger domicilié, le sieur Carlier d'Abaunza était affranchi de la contrainte par corps prononcée par la loi du 17 Avril, 1832.

“La personne des agens diplomatiques,’ a dit le défenseur, ‘est inviolable. C'est un privilège qui résulte de leur caractère même, et de l'autorité qui leur est conférée par leurs lettres de créance. Les publicistes donnent pour raison de cette inviolabilité qu'on pourrait leur

imputer des crimes s'ils pouvaient être punis pour des crimes ; qu'on pourrait leur supposer des dettes s'ils pouvaient être arrêtés pour dettes. Il faut donc suivre vis-à-vis des ambassadeurs les règles tirées du droit des gens, et non celles qui dérivent du droit politique.' (V. Wicquefort ; M. Pardessus, 1448 ; et un décret de la Convention du 13 ventose an II.)

“ Ce principe posé, le défenseur s'efforce de prouver que le titre de consul-général, dont est revêtu son client, suffit pour assurer l'inviolabilité de sa personne, indépendamment de l'*exequatur* qu'il avoue n'avoir point encore été obtenu par M. Carlier d'Abaunza.

“ En second lieu, M^e Jules Favre s'appuie sur l'autorité de Merlin pour soutenir que les Tribunaux ont plein pouvoir pour décider d'après les circonstances, si la résidence prolongée d'un étranger en France n'équivaut pas au domicile exigé par les lois de 1807 et de 1832 pour affranchir l'étranger de la contrainte par corps. Il cite par induction deux arrêts de la Cour de Cassation des 20 Août, 1811, et 6 Février, 1826, un arrêt de la Cour de Paris du 15 Mars, 1831.

“ ‘ Enfin, ’ dit le défenseur, ‘ si l'habitation continue de l'étranger suffit pour lui conférer un domicile suffisant au point de vue de la contrainte par corps, on ne peut, sans torturer le sens de la loi, considérer l'étranger dans le lieu même de sa résidence comme un débiteur forain.’

“ M^e Bochet, pour M. Abrassart, a reproduit les argumens de la sentence.

“ ‘ M. Carlier d'Abaunza, ’ a dit le défenseur, ‘ se prévaut d'immunités auxquelles il n'a aucun droit. S'il a le titre de consul de l'Uruguay, il n'en a jamais exercé légalement les fonctions, en supposant qu'il les ait [*669] jamais exercées, par la raison que le gouvernement *Français lui a refusé l'*exequatur*. En effet, M. le ministre des affaires étrangères a certifié ce fait dans une lettre adressée, à l'occasion du procès, à M. le procureur du Roi, et a ajouté que M. d'Abaunza n'avait aucun droit aux privilèges dont jouissent les agens diplomatiques. Soutenir que le refus d'*exequatur* est chose indifférente, et que les seules lettres de créance, dont M. Carlier peut être porteur, suffisent pour lui assurer les immunités des envoyés des Puissances étrangères, c'est dire qu'un gouvernement étranger aurait le droit d'installer chez nous, et malgré nous, un de ses nationaux, et de l'affranchir des lois qui régissent tous les étrangers en France.

“ ‘ D'ailleurs, ’ ajoute le défenseur, ‘ un consul n'est pas un agent diplomatique. (V. Vattel, Droit des Gens, liv. 4, ch. 5 : ordonnance de 1681 ; cassation, 13 vendémiaire an IX ; Aix, 14 Août, 1829 ; Paris, 28 Avril, 1841.)

“ Sur le second moyen, le défenseur invoque l'autorité de tous les auteurs, Merlin excepté et deux arrêts de la Cour de Paris, des 16 Août, 1811, et 2 Mai, 1834, pour établir qu'en matière de contrainte par corps le seul domicile dont puisse exiger l'étranger en France, est celui qu'il acquiert conformément à l'article 13, du Code civil, c'est-à dire avec l'autorisation du roi. Il soutient, par les mêmes motifs, que l'étranger qui n'a pas de domicile légal en France, et qui n'y possède ni immeubles ni établissement de commerce, doit être assimilé au débiteur forain.

“ La Cour, sur les conclusions conformes de M. l’avocat-général Boucly, a statué en ces termes :—

“ ‘ Considérant que si Carlier d’Abaunza a reçu de la république de l’Uruguay une commission de consul-général à Paris, il est certain qu’il n’a pas obtenu l’*exequatur* du gouvernement du roi ; que dès-lors il n’est pas fondé à prétendre aux prérogatives et immunités qui peuvent appartenir aux consuls ;

“ ‘ Considérant que l’appelant ne justifie pas qu’il soit domicilié en France ;

“ ‘ En ce qui touche la saisie foraine :

“ ‘ Adoptant les motifs des premiers juges,

“ ‘ Confirme.’ ”

*APPENDIX VII. PAGE 438.

[*670]

INTERNATIONAL RELATIONS OF FOREIGN SPIRITUAL POWERS WITH THE STATE.

No. 1.

Memoir of D’Aguesseau upon the Royal Jurisdiction over a Cardinal who is a French Subject.(z)

Précis du Memoire sur la Juridiction Royale.

“ Si la nature n’a point fait naître un cardinal indépendant de l’autorité du roi, la religion ne le soustrait pas davantage à la puissance de son prince.

“ De quelque privilège que la Cour de Rome ait voulu flatter les ecclésiastiques pour se les assujettir entièrement, le droit est certainement du côté des princes, soit que l’on considère que les ecclésiastiques ne cessent pas d’être hommes et citoyens en devenant ecclésiastiques, soit que l’on examine la nature de la puissance séculière, qui seroit imparfaite si elle n’étoit pas universelle, par rapport à la fin pour laquelle elle est établie, et qui ne se suffiroit pas pleinement à elle-même, s’il falloit qu’elle fût obligée de demander la punition d’un de ses sujets à une autre puissance.

“ Si le droit naturel est pour les princes, il n’y a que le droit divin qui ait pu y déroger ; et ce droit divin ne peut se trouver que dans l’ancienne ou dans la nouvelle loi.

“ Or, ni l’une ni l’autre ne donnent aucune atteinte au pouvoir des princes sur les ecclésiastiques dans les matières temporelles.

“ Au contraire, l’une et l’autre le confirme, et surtout la loi nouvelle, la doctrine et l’exemple de Jésus-Christ, la conduite des Apôtres, les maximes qu’ils ont enseignées sur l’obéissance due aux princes, l’interprétation des pères de l’Eglise, la tradition la plus pure et la plus ancienne, la soumission des plus grands évêques, des patriarches, des Papes mêmes, sont autant de preuves éclatantes qui font voir que le droit des princes a plutôt été augmenté que diminué par les principes du Christianisme, et

que ce qui n'étoit auparavant qu'un droit humain et naturel, est devenu, depuis l'établissement de la religion, un droit divin, et un précepte positif de la loi nouvelle.

“ De ces principes, il est aisé de conclure que si l'Eglise a quelque [*671] privilège en cette matière, elle le tient tout entier de la grace *et de la protection des souverains, qu'ils peuvent l'accorder ou ne pas l'accorder, l'étendre ou le limiter à leur gré, le révoquer, le suspendre, le tempérer comme il leur plaît.

“ Ainsi l'on fait sentir les empereurs Romains, auteurs de ce privilège, soit par les termes dans lesquels ils l'ont accordé, soit par les exceptions ou les restrictions qu'ils y ont ajoutées, et surtout, par la célèbre distinction du crime ecclésiastique et du crime commun ou purement politique.

“ L'Eglise a applaudi aux loix de ses empereurs, et surtout à celles de Justinien, qu'elle a canonisées, pour ainsi dire, en les insérant dans les collections de ses décrets.

“ Ces loix ont survécu à la destinée de l'Empire Romain ; la France, surtout, les a reçues et observées sous la première race de nos rois, comme l'Eglise l'a reconnu elle-même dans un concile tenu en ce tems, et comme des historiens dont le témoignage n'est pas suspect, puisqu'ils étoient évêques, l'attestent également. Si dans la suite, et principalement vers la seconde race de nos rois, la piété des princes, l'intérêt du clergé l'autorité des évêques qui s'attribuoient jusqu'au droit de déposer les empereurs ; le mauvais usage, si on l'ose dire, que nos rois avoient introduit de se rendre eux-mêmes accusateurs des évêques coupables de Lèze-Majesté (ce qui répandoit une suspicion général sur tous les Tribunaux séculiers,) ont paru ébranler les anciennes maximes, et donner lieu aux défenseurs de la juridiction ecclésiastique d'en avancer de nouvelles, que les premiers siècles de l'Eglise avoient ignorées ; si les fausses décrétales qu'une imposture trop heureuse fit paroître en ce tems-là, appuyèrent et consacrèrent en quelque manière cette nouvelle doctrine ; si la témérité des compilateurs des loix ecclésiastiques et politiques, alla jusqu'à altérer et à tronquer les loix des empereurs, en les citant d'une manière infidèle ; on a bientôt reconnu et la fausseté des principes, et le danger des conséquences de ce privilège abusif ; on a senti qu'il tendoit d'un côté à faire jouir les clercs d'une impunité pernicieuse à la société, et de l'autre à les rendre sujets du Pape qui prétendoit s'ériger par là, une monarchie, même temporelle, sur les ecclésiastiques répandus dans tous les Etats des princes Chrétiens.

“ On s'aperçut donc du piège qu'on avoit tendu à la piété des princes sous le voile de la religion. On revint à la sagesse et à la simplicité de l'ancien droit. Ce retour fut marqué par plusieurs traits éclatans, et entr'autres par des lettres d'abolition qu'un Archevêque de Bourges fut obligé d'obtenir du roi, pour avoir avancé dans des statuts synodaux, que les clercs ne pouvoient être ni poursuivis, ni punis civilement ou extraordinairement, par un juge séculier.

“ Ainsi on rétablit pleinement la distinction que les empereurs Romains [*672] avoient faite entre le crime ecclésiastique et le crime politique. Les Papes mêmes furent obligés de donner lieu au *rétablis-

ment de cette distinction, en reconnoissant qu'il y avoit certains cas énormes qui faisoient perdre aux coupables le privilège clerical.

“ C'est surtout au crime de Lèze-Majesté qu'on peut appliquer cette règle, quoique la modération de nos rois les ait souvent portés à attendre le jugement du Tribunal Ecclésiastique, avant que de faire condamner, dans les Tribunaux séculiers, les clercs accusés de ce crime.

“ Les évêques n'ont rien qui les distingue en cette matière des ministres d'un ordre inférieur.

“ C'est une vérité reconnue par ceux mêmes qui sont le plus opposés en ce point à l'autorité des rois, puisque les principes généraux qu'ils établissent, comprennent les moindres clercs, comme ceux du premier ordre, et que c'est pour cette raison, qu'on a donné au privilège dont il s'agit le nom de privilège clérical.

“ Aussi les princes se sont toujours maintenus dans la possession de connoître des crimes commis par les évêques, comme de ceux qui avoient été commis par d'autres ecclesiastiques.

“ On peut rapporter les preuves de cette possession à quatre tems principaux.

“ Le premier, depuis la venue de Jésus-Christ, Jusqu'au règne des enfans de Constantin.

“ Le second, depuis ce règne jusqu'au commencement de de la seconde race de nos rois.

“ Le troisième, depuis la seconde race, jusques vers le commencement de la troisième.

“ Et le dernier, depuis la troisième race jusques à présent.

“ De ces quatre tems, le troisième seul est douteux, à cause des mauvaises maximes qui commencèrent à s'introduire alors, sur l'autorité des princes, et sur celle du Pape.

“ On trouve dans les trois autres des preuves certaines du droit des princes. Plusieurs exemples d'évêques, de patriarches, de Papes mêmes, jugés par les empereurs, ou par les Tribunaux séculiers, l'établissent ; les exemples mêmes des jugemens ecclésiastiques rendus sur des crimes publics dans ces deux premiers tems, la confirment, puisqu'on voit que c'est par l'autorité des princes que les évêques en ont été établis juges.

“ Sans parler de tout ce qui s'est passé sous les empereurs Romains, et sous les deux premières races de nos rois, on trouve près de vingt exemples d'évêques accusés dans des Tribunaux séculiers, six ou sept évêques condamnés à des peines légères, à la vérité, mais qui ne prouvent pas moins pour cela, l'autorité légitime de la Puissance qui les condamnait.

“ S'il y a plusieurs procès criminels commencés contre des évêques qui n'ayent pas été suivis d'un jugement définitif, la religion des princes, la conjoncture des tems, les prétentions des Papes, par rapport aux jugemens canoniques qui retardoient les jugemens *séculiers, parce [*673] qu'ils devoient les précéder en ont été les principales causes, sans qu'on en puisse tirer aucune conséquence contre le droit incontestable des rois.

“ Si l'on passe de la personne des évêques à celle des cardinaux,

le privilège des derniers ne paroîtra pas mieux établi que celui des premiers.

“On ne peut les considérer que comme ministres de l'Eglise, ou comme ministres d'un prince étranger.

“Si on les envisage dans leur état ecclésiastique, ils ne sont que diacres, prêtres, ou évêques, et par conséquent ils ne peuvent de droit avoir de plus grand privilège que ceux qui sont dans le même degré de la hiérarchie. L'honneur qu'ils ont d'être consacrés au service de la première Eglise, d'être à présent les électeurs des Papes, et les conseillers nés du Souverain Pontife, peut bien les distinguer dans l'ordre de la puissance ecclésiastique, mais non pas les soustraire à une puissance d'un autre genre, c'est-à-dire, à l'autorité temporelle des rois ; et quelque élevés qu'ils soient, peuvent-ils prétendre avoir plus de privilège que le Pape même, qui tant qu'il n'a pas réuni la qualité de prince temporel à celle de chef de l'Eglise, a été soumis à la puissance des empereurs.

“Si on les considère dans leur état politique comme ministres d'un prince étranger, l'engagement qu'ils contractent avec lui n'étant que d'un droit purement civil et positif, ne peut rompre les nœuds naturels et indissolubles qui attachent un sujet à son souverain ; toute autre obligation doit céder à ce premier devoir ; souvent et presque toujours, ce que les cardinaux doivent au roi n'est point incompatible avec ce qu'ils doivent au Pape ; mais si ces deux engagements se trouvent contraires, celui que Dieu même a formé, doit l'emporter sur celui qui est l'ouvrage de l'homme.

“Ainsi le supposèrent autrefois nos pères, lorsqu'ils faisoient jurer aux cardinaux de revenir de Rome, aussi-tôt que le roi les rappelleroit auprès de lui.

“Ainsi le Parlement l'a-t-il encore déclaré de nos jours, lorsqu'il reçut le Procureur Général, appelant d'une bulle d'Innocent X., qui défendoit aux cardinaux de sortir de l'état ecclésiastique, sans la permission du Pape.

“Ainsi l'ont souvent reconnu les Papes mêmes, lorsqu'ils ont supposé qu'un cardinal pouvoit commettre un crime de Lèze-Majesté, contre son prince naturel, et par conséquent qu'il ne cessoit point d'être sujet pour devenir celui du Pape ; car il n'y a qu'un sujet qui puisse commettre un crime de Lèze-Majesté.

“Il ne faut donc pas s'étonner après cela, si depuis même que cardinaux sont parvenus au point de grandeurs où nous les voyons aujourd'hui, on n'a point douté en France que le roi ne fût en droit de leur faire faire leur procès, lorsqu'ils commettraient un crime, et surtout un crime de Lèze-Majesté.

[*674] “Le Cardinal de Constance fut accusé sous Louis XI., et condamné à une amende.

“Le Cardinal Ballue fut accusé et arrêté prisonnier sous le même prince. Dans toute négociation qui se passa, sur ce sujet, entre le Pape et le roi, la France soutint hautement les mêmes maximes qu'elle soutient encore aujourd'hui, le pouvoir suprême des rois dans les matières temporelles, établi par le droit divin, tant sur les ecclésiastiques, *de quelque Etat qu'ils soient*, que sur les laïcs, la distinction du délit

commun, et du cas privilégié, déjà si ancienne dans le royaume, qu'on ne se souvenoit point d'avoir jamais vu pratiquer le contraire; enfin l'atrocité du crime de Lèze-Majesté, qui fait cesser toute exemption, et tout privilège.

“ Le Cardinal de Châtillon fut non seulement accusé, mais condamné, sous le règne de Charles IX., par un arrêt célèbre du Parlement, et si la peine ne paroît pas répondre au titre de l'accusation; il n'en faut accuser suivant toutes les apparences, que la conjoncture du tems dans lequel l'arrêt fut rendu; mais la compétence du Tribunal n'en est pas moins bien établie.

“ La mort du Cardinal de Guise, et la detention du Cardinal de Bourbon sous Henri III., donnèrent occasion d'examiner à fond cette matière; et trois grands prélats, le Cardinal de Joyeuse, le Cardinal d'Ofat, l'Evêque du Mans, justifèrent la conduite d'Henri III., par des principes qui sont encore plus véritables, quand on les a appliqués à une accusation instruite dans toutes les formes.

“ Le Cardinal de Sourdis décrété de prise de corps par le Parlement de Bourdeaux sous les yeux de Louis XIII., et avec l'approbation expresse de ce prince; enfin le Cardinal de Retz accusé par ordre du roi, en vertu d'une commission adressée au Parlement, sont autant d'exemples qui prouvent la possession de nos rois et de nos magistrats sous leur autorité.

“ Si des considérations de politique, si des raisons d'Etat, et souvent des conseils inspirés par des intérêts particuliers, ont suspendu quelquefois ces grandes et importantes affaires, l'autorité du roi n'y a souffert aucun préjudice; puisqu'après tout, il ne faut pas être moins compétent pour instruire un procès que pour le juger, et pour décréter un coupable, que pour le condamner.

“ Ainsi la qualité de cardinal n'effaçant point les engagemens naturels, y ajoute encore ceux de la reconnoissance, et un cardinal qui viole les uns et les autres, mérite d'être poursuivi, et comme rébelle à l'égard de son prince, et comme ingrat à l'égard de son bienfaiteur.

“ Si la place qu'il tient dans le Sacré Collège lui attribue, outre cela, la qualité d'évêque d'un diocèse étranger, cette qualité ne peut lui donner un privilège plus grand que la dignité même de cardinal; à la vérité, s'il commettoit une faute comme Evêque d'Albano ou d'Ostie, il n'auroit que le Pape pour juge; mais *dès le moment qu'il s'agit d'un crime de Lèze-Majesté commis dans le royaume, le roi seul [*675] peut venger sa majesté méprisée; et il aviliroit ce caractère auguste, qu'il n'a reçu que de Dieu, s'il étoit obligé d'aller demander justice contre un sujet infidèle, à un prince étranger.”

*No. 2.

CORRESPONDENCE OF THE ENGLISH SECRETARY OF STATE FOR FOREIGN AFFAIRS, RESPECTING THE AFFAIRS OF ROME, PRESENTED TO PARLIAMENT 15TH JUNE, 1849.

No. 1.

Viscount Palmerston to the Marquis of Normanby.

"Foreign Office, January 5, 1849.

"(Extract.)

"IN regard to the present position of the Pope, I have to observe that no doubt it is obviously desirable that a person who in his spiritual capacity has great and extensive influence over the internal affairs of most of the countries in Europe, should be in such a position of independence as not to be liable to be used by any one European Power as a political instrument for the annoyance of any other Power; and in this view it is much to be wished that the Pope should be sovereign of a territory of his own.

"On the other hand, if it be admitted as a general principle that questions and differences between the people and the sovereign of each State should be left to be settled by those parties without the interference of any foreign armed force, it is not easy to see, in the peculiar position of the Pope with regard to his subjects, what should make the Roman States an exception to this general rule.

"The main circumstance in which the relations between the Pope and his subjects differ from the relations which subsist between other sovereigns and their subjects, is that the Pope does not reign either by hereditary right or by the choice of the people whom he governs, but that he is elected by the College of Cardinals, a body which is not in its constitution national, which is I believe self-elected, and of which about a half are not natives of the State for which they choose the sovereign.

"These circumstances would seem to render it the more incumbent on the Pope to give to his subjects the requisite securities for good government, and these circumstances would also appear to render it the less justifiable for any foreign Powers to use armed interference in order to assist the Pope in maintaining, if he were so disposed, a bad system of government.

[*676]

*No. II.

Viscount Palmerston to the Marquis of Normanby.

"Foreign Office, January 28, 1849.

"(Extract.)

"WITH regard to the proposal made by Austria to France for a combined military action by Austria, France, and Naples, for the pur-

pose of re-establishing the Pope in the Roman States, your Excellency will say that Her Majesty's Government concur with the Government of France in viewing with much regret this announcement of the wishes and intentions of the Austrian Government. Her Majesty's Government do not pretend to pass judgment in respect to those differences between the Pope and his subjects which led to the retirement of the Pope to Gaeta; but Her Majesty's Government would upon every account, and not only upon abstract principle but with reference to the general interests of Europe, and from the value which they attach to the maintenance of peace, sincerely deprecate any attempt to settle the differences between the Pope and his subjects by the military interference of foreign Powers.

"It appears to Her Majesty's Government, as at present informed, that those differences are not of such a nature as to preclude the hope that they might be accommodated by the diplomatic interposition of friendly Powers, and it is needless to observe how much better such a mode of settlement would be than an authoritative imposition of terms by the force of foreign arms.

"With respect to the attitude which Great Britain would in any case assume in regard to these affairs, your Excellency will say that the attitude of this country would be that of observation, and that Great Britain could take no part in such matters beyond expressing, if it should appear to be necessary, the opinion which Her Majesty's Government might entertain thereupon.

"These affairs, however important in their bearing upon the general interests of Europe, do not immediately affect any direct interests of Great Britain; and whatever turn therefore these affairs may take, Her Majesty's Government do not foresee that it is likely that the course of these events would afford to the British Government any just reason for departing from that passive and observant attitude which the position of Great Britain in regard to these affairs seems naturally to point out."

*No. III.

[*677]

Prince Castelficala to Viscount Palmerston.

"Londra, 2 febbrajo, 1849.

"LE tribolazioni che soffre il sommo Pontefice, profugo dalla sua capitale e rifugiato in Gaeta, contristano a ragione tutto l'orbe Cattolico, e destano l'ansietà e 'l desiderio universale di vedere Sua Santità prestamente restituita alla indipendenza ed alla dignità primiere.

"Il Governo di Madrid ha creduto in tal circostanza prendere una iniziativa tutt'affatto Cattolica; ha proposto la riunione di un Congresso onde regolare definitivamente i gravi casi di Roma; ha invitato all'uopo i Governi di Francia, Austria, Due Sicilie, Portogallo, Baviera, Sardegna, e Toscana, presso i quali tutti il culto dominante è il Cattolico; ed ha indicato come possibil sede delle Conferenze, Madrid o qualunque altra città Spagnuola sul littorale del Mediterraneo.

Di siffatte cose il Duca di Rivas, Ambasciadore di Spagna presso la

Corte delle Due Sicilie, diede con nota de' 2 dello scorso Gennaio partecipazione al Governo di Sua Maestà Siciliana.

“ Sua Santità intanto, cui per le convenevoli vie diplomatiche si era dal Gabinetto Spagnuolo fatta la simil partecipazione, osservava esser meglio spedito che il Congresso si riunisca presso la sua persona, come principalmente interessata nello affare; osservava che Madrid o qualunque altra città di Spagna sarebbero forse eccentriche, e mal risponderebbero alla urgenza delle circostanze ed alla indispensabil rapidità di comunicazioni; ed incaricava il suo Nunzio a Madrid di manifestare a quel Governo tali sue osservazioni.

“ Il Rè delle Due Sicilie ha applaudito al nobile pensiero di un Congresso, cui scopo sarà di restituire al Capo della Chiesa Cattolica lo indipendente esercizio delle sue altissime e sacrosante funzioni. Conformandosi però, circa la sede delle conferenze, a' desideri espressi da Sua Santità ha offerto Napoli per punto di riunione, Napoli che delle città d'Italia è or la più tranquilla, ch'è vicinissima a Gaeta, e che or racchiude in se la maggior parte de' Cardinali del Sacro Collegio e de' più distinti personaggi della Corte Romana.

“ Oltracciò, Sua Maestà Siciliana ha creduto necessario, e formalmente domanda la intervenzione nello enunziato Congresso dell' Inghilterra, Russia, e Prussia; la presenza di tali Grandi Potenze essendo troppo reclamata in una discussione la quale (oltre l'importantissimo oggetto della [*678] religione) potrà potentemente influire su le cose politiche e su la concordia delle Due Sicilie e della Italia intera.

“ Il Sottoscritto, Inviato Straordinario e Ministro Plenipotenziario della Maestà Sua presso Sua Maestà Britannica, nel far quindi d'ordine del son Governo a sua Eccellenza il Visconte Palmerston, Principal Segretario di Stato al Dipartimento degli Affari Esteri, la sopracennata narrazione, e nel pregare l'Eccellenza sua di una risposta all'uopo, non omette rimarcarle che la premura spiegata del Rè delle Due Sicilie per la intervenzione dell' Inghilterra è una pruova della fiducia che Sua Maestà ripone ne' sentimenti amichevoli di un antico alleato, ed è un giusto omaggio che rende alla saviezza del Gabinetto de St. James.

“ Il Sottoscritto, &c.

“(Firmato) CASTELCICALA.”

No. IV.

Viscount Palmerston to Prince Castelcicala.

“ Foreign Office, February 10, 1849.

“ THE undersigned, &c., has the honour to acknowledge the receipt of the note which Prince Castelcicala, &c., addressed to him on the 2nd instant, giving an account of what has passed with reference to a proposition made by the Court of Madrid, that the principal Roman Catholic Powers should take into their consideration with a view to their settlement the affairs of His Holiness the Pope, and calling the attention of the undersigned to the fact that the Cabinet of Naples considers it necessary, and formally demands that England, Prussia, and Russia should take part in the proposed deliberations, the matter to be treated of, independently of

its religious bearing, being one calculated to have a great influence of a political character.

“The undersigned has the honour to state to Prince Castelcicala in reply, that the Government of His Sicilian Majesty only does justice to the Government of Her Majesty in supposing that Her Majesty’s Government would feel great pleasure in contributing, as far as they might probably be able to do so, to bring about such an amicable arrangement of the differences existing between the Pope and his subjects as might enable the Pope to return to Rome, and might also restore permanent contentment and tranquillity to the Roman States.

“Her Majesty’s Government, however, have not received any specific application on this subject from the Pope; and until *such application is made, they are unable to say what steps, if any, Her [*679] Majesty’s Government might think it expedient to take in regard to these matters.

“The undersigned, &c.

“(Signed) PALMERSTON.”

No. V.

Viscount Palmerston to the Marquis of Normanby.

“Foreign Office, March 9, 1849.

“(Extract.)

“ALTHOUGH Great Britain has not so direct an interest as France has in the ecclesiastical and political questions which arise out of the present relations between the Pope and the people of the Roman States, the British Government nevertheless cannot view those matters with indifference. Great Britain is indeed a Protestant State, but Her Majesty has many millions of Catholic subjects; and the British Government must therefore be desirous, with a view to British interests, that the Pope should be placed in such a temporal position as to be able to act with entire independence in the exercise of his spiritual functions. Great Britain is so far distant from Italy that the political events of the Italian Peninsula cannot have the same direct bearing upon British interests which those events must exert upon the interests of nearer States; but still as those events must always have a powerful influence upon matters involving questions of peace or war in Europe, the British Government must necessarily watch those events with much attention and anxiety.

“The present condition of the relations between the Pope and the people of his States has therefore been looked at with deep solicitude by Her Majesty’s Government. It would have been the earnest wish of Her Majesty’s Government, both on general principles and with reference to the particular circumstances of the case, that the differences between the Pope and his subjects should have been adjusted by negotiation, either between the Pope and his subjects directly, or by means of the interposition of friendly Powers. A direct negotiation between the Pope and his subjects seems now to have been rendered impossible by the course of

events at Rome, and by the tendency of those counsels which there is reason to think are suggested to the Pope by the persons who surround him at Gaeta. But Her Majesty's Government do not see, even in the recent [*680] occurrences at Rome, any *reason for giving up the hope that the diplomatic interposition of friendly Powers might still, without any actual employment of military force, bring about such a settlement of differences as would enable the Pope to return to Rome and to resume his temporal authority; and Her Majesty's Government, deprecating as they do, on principle, the employment of a foreign military force to settle internal dissensions in a State except in extreme and peculiar cases, would greatly rejoice if the Powers to whom the Pope has now appealed for assistance to extricate him from his difficulties, were to try the effect of their moral influence at Rome, before they resorted to any other more active measures.

"It seems to Her Majesty's Government that a strong and unanimous manifestation of the opinion of those Powers in support of order on the one hand, and of constitutional rights on the other, would bring to reason the minority who now exercise paramount authority at Rome; and would give courage and confidence to the majority who have been hitherto intimidated and overborne; and if Great Britain had been invited to be a party to these negotiations, and if an invitation to that effect had been accepted such would have been the course which Her Majesty's Government would have recommended that the parties to the transaction should pursue.

"Her Majesty's Government have learnt with much pleasure that France has been included in the invitation addressed by the Pope to some of the Catholic Powers, requesting them to take an active interest in the present condition of his affairs; and Her Majesty's Government hope that if there is to be a concert among any of the Powers of Europe in regard to those affairs, the French Government will not decline the invitation to be a party thereto. There are many very obvious reasons why in several points of view it would be desirable that these matters should not be disposed of without the participation of France.

"Your excellency says that the French Government would have preferred that Sardinia should have been invited to take part in these deliberations. Her Majesty's Government are entirely of the same opinion.

"The participation of Sardinia would mitigate the foreign character of the negotiation, and if a contingency were to arise which should lead to the employment of any military force within the Roman Territory, Piedmontese troops would for many evident reasons be better suited for such purpose than the troops of Austria or of any State not belonging to the Italian Peninsula.

"The opinion then of Her Majesty's Government upon the points on which the Government of France has wished to have it is, that it would be desirable that France should be a party to the proposed deliberations, and that Sardinia should take part in them also; that it would be desirable that every endeavour should be made to bring about a settlement [*681] between the Pope *and his subjects by negotiation and by moral influence before resorting to the employment of force; and that

one condition of the reinstatement of the Pope ought to be that he should engage to maintain in their main and essential provisions the constitutional and representative institutions which he granted to his subjects last year."

No. VI.

The Marquis of Normanby to Viscount Palmerston.—(Received March 9.)

"Paris, March 8, 1849.

"My Lord,

"I HAVE the honour to transmit the copy of a note I have received from the Apostolic Nuncio, inclosing one which has been addressed by the Cardinal Antonelli to the Representatives of all friendly Powers, requesting them to co-operate for the purpose of re-establishing Papal authority at Rome.

"I have, &c.

"(Signed) NORMANBY."

Inclosure 1, in No. VI.

The Apostolic Nuncio to the Marquis of Normanby.

"Paris, ce 6, Mars, 1849.

"M. le Marquis,

"PAR suite des graves événemens qui successivement se sont accomplis à Rome, le Très Saint Père s'est trouvé dans la nécessité d'adresser à toutes les Puissances amies du St. Siège une invitation formelle de coopérer au rétablissement de l'autorité du Gouvernement Pontifical comme seul moyen d'arrêter l'anarchie qui opprime les Etats de l'Eglise; et je suis chargé par ordre exprès de Sa Sainteté de transmettre ci-joint à votre Excellence la copie de la note de son Eminence M. le Cardinal Secrétaire d'Etat, en vous priant, M. l'Ambassadeur, de la porter à la connaissance du Gouvernement de Sa Majesté Britannique, et d'y joindre vos bons offices pour l'accomplissement des vues du Très Saint Père.

"Sa Sainteté aime à espérer qu'elle trouvera dans les dispositions des Puissances amies un secours efficace qui puisse satisfaire aux vœux, aux prières réitérées de l'immense majorité de ses fidèles *sujets, [*682] demandant tous d'être soulagés des violences et des oppressions dont ils sont l'objet de la part d'une faction audace et impie.

"Le Saint Père qui a été très touché de l'intérêt et des sympathies que Sa Majesté la Reine d'Angleterre, votre Auguste Souveraine, a bien voulu lui témoigner par la lettre qu'elle lui a adressée au mois de Janvier dernier, est conforté de la pensée que le Gouvernement de Sa Majesté, qui s'intéresse vivement à l'ordre et à la paix de l'Europe, voudra dans les circonstances actuelles prêter le meilleur concours pour faire cesser

un état de choses si nuisible à la paix générale et au bonheur des peuples, et appuyer de sa puissante influence le concours réclamé pour le rétablissement du pouvoir légitime du Saint Père dont indépendance est plus que jamais nécessaire pour l'exercice de son autorité dans le Monde Catholique.

“Veuillez, M. le Marquis, je vous prie, transmettre le plus promptement possible ma communication à votre Gouvernement, et recevez, &c.

“(Signé)

R. ARCHEVEQUE DE NICEE,

“*Nonce Apostolique.*”

Inclosure 2, in No. VI.

Cardinal Antonelli to the Representatives of Foreign Powers.

Gaeta, 18 febbrajo, 1849.

“LA Santità di nostro Signore, fino dai primordii del suo Pontificato, non ebbe altro in mira che di prodigare beneficenze verso i suoi sudditi a seconda dei tempi, provvedendo ad ogni lor miglior bene. In fatti dopo aver pronunziato la parola del perdono a coloro che per delitti politici o erano esuli o giacevano nel carcere, dopo aver eretta la Consulta di Stato ed istituito il Consiglio de' Ministri, accordata per la imperiosa violenza delle circostanze la istituzione della Guardia Civica, la nuova legge per una onesta libertà della stampa, ed infine uno statuto fondamentale per gli Stati di Santa Chiesa, aveva egli ben diritto a quella riconoscenza che i sudditi devono ad un Principe, il quale non li riguardava che come suoi figli, e non prometteva loro se non un regno di amore. Ma ben altro fu il ricambio che ritrasse da tanti benefici e condiscendenze loro prodigate. Dopo brevi dimostrazioni di plauso, guidate però da chi già aveva nel seno le più ree intenzioni (dimostrazioni che il Santo Padre con i modi tutti proprii del paterno suo cuore procurò di far cessare) ben tosto sperimentò l'amaro frutto della ingratitude. Violentato egli dalla sfrenatezza di una fazione ad impugnarsi in una guerra contro l' Austria, si trovò costretto di pronunciare una allocuzione [*683] nel Concistoro dei 19 Aprile dello scorso anno, con la quale dichiarò al mondo intero che il suo dovere e la sua coscienza nol consentivano. Tanto bastò perchè prorompevano le già predisposte machinazioni in aperte violenze all' esercizio del suo pieno e libero potere, costringendolo alla divisione del Ministero di Stato in ecclesiastico e civile, divisione che non mai riconobbe.

“Si confidava però il Santo Padre che ponendo ai diversi Ministerii persone idonee ed amanti dell' ordine, fossero le cose per prendere migliore andamento, e si arrestassero in parte quei mali che già minacciavano sciagure. Ma un ferro micidiale, brandito da mano assassina, troncò le concepite speranze con la morte del Ministro Rossi. Da questo delitto menato in trionfo, si inaugurò impudentemente il regno della violenza; si circondò di armati il Quirinale, lo si tentò d'incendio, si esplosero colpi contro gli appartamenti ove dimorava il Sommo Pontifice, e si ebbe il dolore di vedere che uno dei segretarii ne rimanesse vittima;

volevasi infine col cannone aprire a viva forza il suo palazzo, laddove non cedesse ad ammettere il Ministero che gli veniva imposto.

“Con una serie di fatti sì atroci, come a tutti è ben noto, avendo dovuto soccombere all’impero della forza, si vide il Pontefice nella dura necessità di allontanarsi da Roma e da tutto lo Stato Pontificio, a fine di ricuperare quella libertà che gli era stata tolta, e di cui deve godere nel pieno uso della suprema sua potestà. Per disposizione della Divina Provvidenza riparatosi a Gaeta, ed ospitato da un Principio eminentemente Cattolico, circondato da un gran del Sagro Collegio e dai Rappresentanti di tutte le Potenze con le quali è in amichevoli rapporti, non tardò un momento a fare sentire la sua voce ad annunziare coll’atto Pontificio del 27 Novembre prossimo passato i motivi della temporanea separazione dai suoi sudditi, la nullità e la illegalità di tutti gli atti emanati dal Ministero estorto dalla violenza, ed a nominare una commissione governativa purchè assumesse la direzione dei pubblici affari durante l’assenza dai suoi Stati.

“Per nulla apprezzandosi la emanazione de’ suoi voleri, e procurandosi con mendicati pretesti di eludere la loro forza presso la classe inesperta, si passò dagli autori delle sacrileghe violenze ad attentati maggiori, arrogandosi quei diritti che al Sovrano solo si appartengono, con l’istituzione di una illegittima rappresentanza governativa col titolo di provvisoria e suprema Giunta di Stato. Contro il quale gravissimo e sacrilego misfatto il Santo Padre solennemente protestò, con l’altro suo atto del 17 Dicembre prossimo passato, annunziando non essere quella Giunta di Stato se non una usurpazione dei sovrani poteri, nè avere perciò alcuna autorità.

“Si aspettava egli che tali proteste richiamassero ai doveri di fedeltà e di sudditanza i traviati, ma invece un nuovo e più mostruoso atto di palese fellonia, di vera ribellione colmò la sua amarezza. Tale fu la convocazione di un’ assemblea generale *nazionale dello Stato Romano, per stabilire nuove forme politiche da darsi agli Stati [*684] della Santa Sede. Laonde con altro Moto Proprio del 1° dell’ ora decorso Gennajo protestò contro quell’atto, e lo condannò qual enorme e sacrilego attentato commesso in pregiudizio della sua indipendenza e sovranità meritevole dei gastighi comminati delle leggi sì divine come umane, e vietò ad ognuno de’ suoi sudditi il prendervi parte, avvertendoli che chiunque osa attentare contro la temporale sovranità dei Sommi Pontefici Romani, incorre nelle censure e specialmente nella scomunica maggiore, pena nella quale dichiarò essere incorsi coloro eziandio che in qualunque modo e sotto mentito pretesto hanno violata ed usurpata la sua autorità.

“Come si accogliesse dal partito, simile protesta e si autorevole condanna, basterà l’accennare che si tentò ogni sforzo per impedirne la divulgazione, si sottopose a gastighi chi osasse istruirne il popolo, chi non secondasse le loro mire, tuttavia ad onta di sì maudita violenza la maggioranza dei sudditi rimase fedele al proprio Sovrano, e si espose a sacrificii ed a pericoli ancora della vita, piuttosto che mancare al dovere di suddito e di Cattolico. Inasperito maggiormente il partito medesimo nel vedere contrariati i loro disegni, raddoppiarono in mille modo la

violenza ed il terrore, senza riguardo alcuno a condizione o grado, ma volendosi consumare ad ogni costo questo eccesso di fellonia si ricorse pure alle arti le più vili e mercenarie. Così passando di eccesso in eccesso, con abusare delle stesse beneficenze concesse dal Pontefice, e specialmente convertendo nella più ributtante licenza la libertà della stampa, dopo le più inique malversazioni per premiare i loro complici e non più tollerare la presenza degli onesti e timorati, dopo tanti assassinii commessi sotto la loro egide, dopo aver disseminato ovunque la ribellione, il mal costume, la irreligione, dopo aver sedotta tanta gioventù incauta, non più rispettando i luoghi sagri e gli asili di pace e di solitudine, ne' i luoghi stessi di pubblico insegnamento per convertirli in covili della più indisciplinata milizia raccolta da profughi e scelerati di estere contrade, si vuol ridurre la capitale del mondo Cattolico, la sede dei Pontefici, in una sede di empietà, atterrando, se fosse possibile, ogni idea di sovranità in chi dalla provvidenza è destinato a reggere la Chiesa universale, e che appunto per esercitare liberamente questa sua autorità su tutto l'orbe Cattolico, gode di uno stato come patrimonio della Chiesa; alla quale vista di desolazione e di strage non può il Santo Padre non rimanere profondamente addolorato, commosso altresì dal grido de' suoi buoni sudditi, che reclamano il suo ajuto, il suo soccorso per essere liberati dalla più atroce tirannia.

“La Santità Sua, com'è palese, poco dopo giunta in Gaeta, sotto il giorno 4 Dicembre prossimo passato, diresse la sua voce a tutti li Sovrani coi quali è in relazione, e dando lor parte del suo allontanamento dalla capitale e dallo Stato Pontificio, e delle *cause che lo provocava-
 [*685] rono, invocava il loro patrocinio per la difesa dei dominii della Santa Sede. Ed è pure di dolce soddisfazione il manifestare di avere presso che tutti amorevolmente corrisposto, prendendo la più viva parte alle sue amarezze, alla penosa sua situazione, offrendosi pronti in suo favore, ed esternando al tempo stesso sensi ossequiosissimi di devozione e di attaccamento.

“Nella aspettativa di sì felici e generose disposizioni, mentre Sua Maestà la Regina di Spagna aveva con tanta sollecitudine promosso un Congresso delle Potenze Cattoliche per determinare i mezzi onde prontamente ristabilire il Santo Padre ne' suoi Stati, e nella sua piena libertà ed indipendenza, proposizione alla quale avevano prestato adesione varie Potenze Cattoliche, e stavasi in attenzione di quella delle altre, è pur d'uopo con dolore riferire, che le cose dello Stato Pontificio sono in preda di un incendio devastatore per opera del partito sovvertitore di ogni sociale istituzione, che sotto spezziosi pretesti di nazionalità ed indipendenza nulla ha trascurato di porre in opera per giungere al colmo della loro nequizia. Il decreto, detta fondamentale, emanato nel dì 9 corrente, dall'Assemblea Costituente Romana offre un'atto che da ogni dove ribocca della più nera fellonia e della più abominevole empietà. Con esso dichiarasi principalmente decaduto il Papato di fatto e di diritto dal governo temporale dello Stato Romano, si proclama una repubblica, e con altro atto si decreta l'abbassamento degli stemmi del Santo Padre. Sua Santità nel vedere così vilipesa la suprema sua dignità di Pontefice e Sovrano, protesta in faccia ai Potentati tutti, ed a tutti i singoli Cattolici del mon-

do universo, contro questo eccesso d'irreligione, contro sì violente attentato di spoglio degli imprescrittibili e sagrosanti suoi diritti. Quindi laddove non si accorresse con un pronto riparo, giungerebbe il soccorso allorquando gli Stati della Chiesa, ora interamente in preda de suoi acerrimi nemici, fossero ridotti in cenere.

“Pertanto avendo il Santo Padre esauriti tutti i mezzi che erano in suo potere, spinto dal dovere che ha al cospetto di tutto il mondo Cattolico di conservare integro il patrimonio della Chiesa e la sovranità che vi è annessa, così indispensabile a mantenere la sua piena libertà ed indipendenza come capo supremo della Chiesa stessa, e mosso altresì dal gemito dei buoni che reclamano altamente un ajuto, non potendo più oltre sopportare un giogo di ferro ed una mano tirannica, si rivolge di nuovo a quelli stesse Potenze, e specialmente a quelle Cattoliche che con tanta generosità di animo, ed in modo non dubbio hanno manifestata la loro decisa volontà di esser pronte a difendere la sua causa, nella certezza che vorranno con ogni sollecitudine concorrere con il loro morale intervento, affinchè venga egli restituito alla sua sede, alla capitale di quei dominii che furono appunto costituiti a mantenere la sua piena libertà ed indipendenza, e garantiti *eziandio dai trattati che formano la base [*686] del diritto pubblico Europeo.

“E poichè l'Austria, la Francia, la Spagna, ed il Regno delle Due Sicilie si trovano per la loro posizione geografica in situazione di potere sollecitamente accorrere con le loro armi a ristabilire nei dominii della Santa Sede l'ordine manomesso da un'orda di settarii, così il Santo Padre, fidando nel religioso interesse di queste Potenze figlie della Chiesa, domanda con piena fiducia il loro intervento armato per liberare principalmente lo Stato della Santa Sede da quella fazione di tristi che con ogni sorta di sceleraggine vi esercita il più atroce despotismo.

“Per tal modo solo potrà essere ripristinato l'ordine negli Stati della Chiesa, e restituito il Sommo Pontefice al libero esercizio della suprema sua autorità, siccome lo esiggon inperiosamente il sacro ed augusto suo carattere, gl'interessi della Chiesa universale, e la pace dei popoli; e così potrà egli conservare quel patrimonio che ha ricevuto nell'assunzione del Pontificato per trasmetterlo integro ai suoi successori. La causa è dell'ordine e del Cattolicismo. Per la qual cosa il Santo Padre si confida chementre tutti le Potenze con cui si trova in amichevoli relazione, e che in tanti modi nella situazione in che è stato gettato da un partito di faziosi, gli hanno manifestato il loro più vivo interesse daranno un'assistenza morale all'intervento armato, che per la gravità delle circostanze ha dovuto invocare, le quattro Potenze di sopra accennate non indugieranno un momento di prestare l'opera loro richiesta rendendosi così benemerite dell'ordine pubblico e della religione.

“Il Sottoscritto, Cardinale Pro-Segretario di Stato di Sua Santità, interessa per tanto vostra Eccellenza affinchè si compiaccia portare questa nota il più sollecitamente possibile a cognizione del suo Governo; e nella fiducia di benevola accoglienza, ha l'onore, &c.”

No. VII.

Viscount Palmerston to the Marquis of Normanby.

"Foreign Office, March 27, 1849.

"My Lord,

"I HAVE received your Excellency's dispatch of the 8th instant, transmitting to me the copy of a note which your Excellency had received from the Apostolic Nuncio, inclosing the copy of the note which has been addressed by Cardinal Antonelli to the Representatives of all friendly Powers, requesting them to *co-operate for the purpose of re-es-
[*687] tablishing the Papal authority at Rome.

"I have to instruct your Excellency to say to the Nuncio that Her Majesty's Government have received and have attentively considered the communication which he has made to them through your Excellency and that you are instructed to express to him the deep regret with which Her Majesty's Government have witnessed the differences which have arisen between the Pope and his subjects, the assassination of Count Rossi, the departure of the Pope from his capital and States, and the proclamation of a Republic at Rome.

"The British Government is for many obvious reasons not desirous of taking an active part in any negotiations which may result from the application which the Pope has addressed to some of the Catholic Powers of Europe, whose territories are nearer than Great Britain in Geographical proximity to the Italian Peninsula. But the British Government will be much gratified if the result of those negotiations should be such a reconciliation between the Pope and his subjects as might enable the former with the free good-will and consent of the latter to return to his capital, and there to resume his spiritual functions and his temporal authority. But it is the opinion of Her Majesty's Government that such a reconciliation could scarcely be effected, or if effected for the moment, could never be permanent, unless the basis upon which it was founded were to be that the Pope should engage to maintain the Constitutional and Representative system of Government which he granted last year to his subjects, and unless the separation between the spiritual authority and the temporal powers and institutions of the State were so clearly and so distinctly established as to put an end to those manifold grievances which the mixture of the spiritual with the temporal power has for so long a period of time produced in the Roman States. The great importance of admitting laymen to administrative and judicial functions in the Roman States was pointed out to the late Pope by the memorandum presented in 1832 to the Roman Government by the Representatives of Austria, France, Great Britain, Prussia and Russia, and the events which have happened since that time, not only in the Roman States but in the rest of Europe, have tended to make it still more important that such a reform should be carried out into full and complete execution.

"Your Excellency will give the Nuncio a copy of this despatch.

"I am, &c.

"(Signed) PALMERSTON."

*No. 3.

[*688]

Regulations of the College of Cardinals after the Death of Martin V.
(A. D. 1431.)(a)

“Noi tutti e singoli Cardinali infrascritti giuriamo e promettiamo a Dio ed a’ suoi Santi, e promettiamo alla Santa Chiesa, che se qualcuno di noi sarà eletto Papa, subito dopo la sua elezione giurerà e prometterà sinceramente, schiettamente ed in buona fede di fare osservare ed adempiere efficacemente i capitoli infrascritti, e di darne ai Cardinali, nel termine di tre giorni dopo la coronazione, una Bolla a perpetua memoria del fatto, che abbia forza di decretale e di costituzione, a cui in perpetuo si debba osservanza inviolabile, nè si possa contravvenire senza l’espresso consenso della maggior parte dei Cardinali presenti in Curia, del quale consenso faranno testimonianza le firme loro :

“I. Il Papa riformerà la Curia Romana nel capo e nelle membra, qualunque volte e quante il Collegio dei Cardinali ne lo richiegga, ed osserverà la riforma come legge, nè potrà senza il consiglio ed il consenso della maggior parte dei Cardinali trasportare la Curia fuori di Roma, da luogo a luogo, da provincia, a provincia, da patria in patria.

“II. Il Papa celebrerà o farà celebrare il Concilio generale solennemente e nelle debite forme nel luogo e tempo da stabilirsi per consiglio dei Cardinali, e riformerà in esso o farà riformare la Chiesa universale circa la fede, la vita ed i costumi, così rispetto ai chierici secolari e regolari, come ai religiosi e militari, e tanto riguardo ai Principi temporalì, quanto alle comunità, in tutto ciò che appartenga al giudizio ed alle provvisioni della Chiesa.

“III. Il Papa non creerà nuovi Cardinali se non a’ termini della forma e degli ordinamenti sanciti nel Concilio di Costanza, i quali avrà obbligo di osservare, se per consiglio e consenso della maggior parte dei Cardinali non sembri opportuno fare diversamente.

“IV. I Cardinali avranno il diritto di esporre liberamente il proprio parere al Papa : non potrà il Papa fare violenza, nè permetterà sia fatta nella persona o nei beni loro, nè farà alcuna mutazione allo stato e provvisione loro se non in forza di espresso consiglio e consenso della maggior parte, nè potrà condannare alcuno, se non sia convinto pel numero dei testimoni scritto nella costituzione di Silvestro Papa.

“V. Il Papa non occuperà in modo alcuno, nè permetterà sieno *occupati i beni dei Cardinali, Prelati ed altri cortigiani morti in Curia, ma permetterà che secondo il diritto e la consuetudine, [*689] che si osserva in molti regni e regioni, se ne faccia uso secondo la volontà del defunto, lasciando alla coscienza di ognuno di legarli come più gli aggrada, eccettuati soltanto quei religiosi, i quali abbiano fatta abdicazione della propria volontà, i beni dei quali passeranno a chi spettino per consuetudine, diritto o privilegio : non occuperà cosa alcuna, quanto ai diritti dei cappelli dei Cardinali defunti, nè permetterà che da altri sieno

(a) Lo Stato Romano of Farini, vol. iv. pp. 322-5.

usurpati, ma lascerà liberi i Cardinali di trasferirli negli eredi testati o intestati, abolito qualsivoglia altro abuso.

“VI. Il Papa riceverà obbedienza dai feudatarii, vicarii, capitani, governatori, senatori, castellani e da tutti gli uffiziali della città di Roma, non solo per sè e suoi successori, ma per tutto il ceto dei Cardinali con tutti e singoli i capitoli opportuni, per modo che, vacando la Sede, le città, terre, luoghi, castella e fortezze sieno consegnate a mandato dei Cardinali liberamente e senza veruna contraddizione.

“VII. Il Papa permetterà che i Cardinali ricevano liberamente la metà di tutti i singoli censi, diritti, rendite, proventi ed emolumenti qualunque della Romana Chiesa, secondo la concessione di Niccolò IV., che osserverà in tutto e per tutto; non darà alcuna delle terre della Chiesa Romana in vicariato, feudo od enfiteusi; non muoverà guerre, nè farà alleanza con qualsivoglia re, principe temporale o comunità; non imporrà nuove gabelle, o nuovi dazi sulla città di Roma, nè accorderà ai re o ad altro signore temporale o comunità esenzione alcuna o altro contro la libertà ecclesiastica sul clero, chiese o beni spettante alle chiese e luoghi pii senza causa ragionevole e senza il consiglio e consenso della maggior parte dei Cardinali.

“VIII. Non alienerà il Papa diritto alcuno in qualunque luogo esso spetti alla Chiesa di Roma, nè conformerà, nè approverà le alienazioni fatte dei diritti spettanti alle altre chiese, religioni ed ordini militari senza il consenso e consiglio della maggior parte dei Cardinali.

“IX. In tutti i casi, finalmente, nei quali sieno richiesti per legge il consiglio ed il consenso dei Cardinali, dovrà di questo consiglio e consenso constare nelle bolle e lettere apostoliche tanto per la menzione espressa del consiglio e consenso prestato, quanto per la firma dei Cardinali.”

AFTER the contents of this volume had gone to press, the author obtained from Greece various pamphlets and essays relating *to [*690] the question of the *Encyclic* of Pope Pius IX. to the Greek Church, and the Reply of the Patriarch of Constantinople.

The following catalogue contains the titles of these works, namely :—

On behalf of Rome :—

1. Confutazione di Antimo Patriarca Scismatico Costantinopolitano, Roma : Tipografia della Civiltà Cattolica, 1854.
2. La Civiltà Cattolica, anno quinto (N° C.,) seconda serie, vol. sesto. Roma : Co' tipi della Civiltà Cattolica, Via del Quirinale, Num. 36. 20 Maggio, 1854.

On behalf of the Greek Church.

(In the Greek and Italian languages.)

1. Enciclica dell' una Santa, Cattolica, ed Apostolica Chiesa agli Ortodossi di ogni Regione. Edita a Costantinopoli, nel 1848, dalla

nazionale Tipografia del Patriarcato, e tradotta del Dr. Giorgio Marcoran. Ristampata a Corfù : 1848.

2. Sopra alcuni Passi dell' Allocuzione di Pio IX. nel Consistoro Segreto del 19 Dicembre, 1853. Osservazioni di Giorgio Marcoran. Corfu ; Tipografia Mercurio, A. Tersachi e T. Romeo, 1854.
3. All' Articolo del Drs. G. B. Scandella, su l' Enciclica di Pio IX. agli Orientali, inserito nel potafoglio Maltese, del 25 Maggio, 1848. Risposta di Giorgio Marcoran, Corcirese. 2^a edizione, con giunte. Corfù : Tipografia Mercurio, A Tersachi e T. Romeo, 1853.

(In the Italian language only.)

4. Risposta all' Articolo della Civiltà Cattolica (Quaderno C., 20 Maggio, 1854) sulla Confutazione di Antimo Patriarca e sopra alcune Osservazioni di Giorgio Marcoran. Corfù ; Giugno, 1854.

(In the Greek language only.)

5. Εγκυκλιος της μιας Αγιας Καθολικης και Αποστολικης Εκκλησιας Επιστολη, προς τους Απανταχου Ορθοδoux. Εν Κωνσταντινουπολει, εκ της Πατριαρχικης του Γενους Τυπογραφιας. 1848.

I N D E X.

The pages referred to are those between brackets [].

A.

Abbé de Mably, 76.
 Abbott (Lord Chief Justice,) on Merchant Ships and Seamen, 100, 198.
 Abdication of Sovereign, Ambassador's Mission ended, 232.
 Act, final, of the Congress of Vienna (1815,) as to Language of Treaties, 53.
 Act of State of foreign Government, Decision of British Courts as to Proof of, 114.
 Agents employed by Governments, Status of, 223. *See* Ambassadors. Provisional Consular, 257.
 Aiguillon (le Duc d'), French Minister, Memoir of, on the Rights of Ambassadors, 200.
 Aix la Chapelle, Congress of, 31, 45. Protocol (separate) signed at, 31. Protocol, signed at, as to Maritime Ceremonials, 44. Rules of Precedence of foreign Ministers agreed at, 51. Peace of (1748,) 53, 70. Of (1668,) 67. Hostages stipulated for, as late as Peace of (1748), 68. Treaty of (1748), 78. Protocol of (1818,) 217.
 Albericus Gentilis. *See* Gentilis.
 Alexander II., 277.
 Allgemeines Landrecht, &c., 209. Bürgerliches Gesetzbuch, 208.
 Alliance, who may contract, 60.
 Alternat, Use of, among States, 49.
 Alphonso (King of Arragon,) 313.
 Ambassador.
Antiquity and Universality of his Rights, 134. *Who may send*, 135. Treaty between Turkey and Russia (1774,) *ib.* Rights of States under Protection, *ib.* Of confederal States, *collectively, individually*, 136. Of Republic of Seven United Provinces,

Embassy lodged in Assembly of States General, *ib.* Of the United States of North America, *ib.* Of Swiss Confederation, 137. Towns subject to Authority of Country wherein situate, having Right of Embassy, *ib.* Right of Embassy in Usurper, 138. Sovereign abdicating, no Title, *ib.* Leslie, Ambassador of Mary Queen of Scots, Case of, 139. Opinions of English Civilians on certain Questions propounded to them regarding, 140. Right of Embassy, during Minority of Sovereign, lodged in Regency, 141; during incapacity of Sovereign, *ib.*; during Vacancy of Throne, *ib.*; Minister delegating Right of Embassy, *ib.* Spanish Ambassador nominates public Ministers to negotiate Treaty of Munster, 142. Right of Embassy in Viceroy of Province, 142; in European Governors of American or Asiatic Dependencies, 143; in great Companies of European States, *ib.*; in rebellious Subjects, *ib.*
Right to Receive, 147. Inherent in all States, *ib.* No Obligation to send or receive, 148. State bound to give Audience to Ambassador, *ib.* May refuse Ambassador sent for a mischievous Purpose, *ib.* Duly-commissioned Ambassador, 149. Cannot refuse Ambassador on the Ground of Sex, *ib.* Instances of *Ambassadors*, 150. State may refuse to receive one of its own Subjects as a foreign diplomatic Agent, *ib.* Exile appointed Ambassador to his own Country, 151. Criminal, 152. No Objection that Ambassa-

dor appointed is not a Native of the Country which sends, 152. Rank or Birth of Ambassador no Ground for Refusal, *ib.* State not bound to receive *Papal Legate* or *Nuncio*, armed with injurious Powers, 153. Existence of a State of War no Ground for Refusal of Ambassador for Purpose of Audience, *ib.* State refusing to receive resident Ambassador within its Territories, 154.

General Status of, 156. Inviolability of, 157. Injuries to, *ib.* Ambassador under Protection of State to which he is sent, *ib.* Offence against Person of, *ib.* Ambassador waiving Privileges, 158. Sovereigns may waive Rights due to them in Person of Ambassador, 159. Ambassador no such Power, 161. Rights of Inviolability applicable to all Societies, 160. Inviolability of, acknowledged by Israelites, 161. Clothed with a religious Character by the Egyptians, *ib.* Passages relating to the *Jus legationis* from the Digest of Justinian, 164. Criminal Jurisdiction with regard to Legate and his Suite, 165. Civil Jurisdiction ditto, *ib.* Resident Ambassadors, 167. Inviolability, Middle Ages, *ib.*

Extent of Inviolability, 170. To what Class of Diplomatic Agents, *ib.* Household of Ambassador, 171. What Subject Matter, *ib.* Period of Commencement, *ib.* Over what Period extended, *ib.* Not affected by the breaking out of War, 172.

Inviolability—Criminal Law.—Case of the Dutch Ambassador for Maladministration of testamentary Trust, 173. Case of Ambassador of Mary Queen of Scots, 176. Case of Mendoza, Spanish Ambassador, for Conspiracy, 177. Case of L'Aubespine, French Ambassador, for Conspiracy, *ib.* Case of one of the Retinue of Duc de Sully, French Ambassador, for Murder, 178. Case of Inoyosa and Colonna, Spanish Ambassadors, for Libel, 179. Case of M. de Bass, French Minister to Cromwell, for Conspiracy, 180. Case of Gyllenborg, Swedish Ambassador, for Conspiracy, 181. Case of the Earl of Holderness, English Ambassador to Venice, 181. Case of *M. Van Hoey*, Dutch Ambassador, 182. Case of *Da Sa*, Brother to the Portuguese Ambassador in England, for Murder, 183. Case of the Prince of Cella-

mare, at the Court of France, for Conspiracy, 184. Ambassador committing Assault, 185. Recognition of Minister by Government conclusive on Judicial Tribunal, *ib.* Privileges of Ambassador extend to his Suite, 186. Inviolability of Ambassador in Transit through a third State, *ib.*

Exterritoriality.—Civil Jurisdiction, Exemption of Ambassador from, 190. As to Exemption of personal Property, 192. Of real Property, *ib.* Dwelling-house of Ambassador, 193. Ambassador becoming a Trader, Exceptions as to personal Property, *ib.* Ambassador acting as a Trustee or Executor, 194. Ambassador becoming Plaintiff in a Cause in Court of foreign Country, 195. Liable to counter Demands, *ib.* Defensive Jurisdiction of Ambassadors, *ib.* Privileges of Exterritoriality extended to Wife of Ambassador, 196 ; to his Family, *ib.* ; to his Suite, *ib.* Waiving Privileges, *ib.* Right of Secretary of Legation to Privileges, 197. Of Secretary to the Embassy, *ib.* Decisions on Statute 7 Anne, c. 12, as to Privileges of Ambassadors, &c., from Arrest or Process, 198. Minister's Passport refused for Non-payment of Debts—Case of *Baron de Wrech* at French Court, 200. Practice of Great Britain in relation to, 201. Decisions on Exceptions to the general Rule, *ib.* Ambassador of Peter the Great, Czar of Muscovy, arrested in London for Debt, 205. Statutes passed by, and Decisions of North American United States respecting, 206. Law of France as to Privileges and Exterritoriality of Ambassadors, 207 ; of Spain, *ib.* ; of Portugal, 208 ; of Russia, *ib.* ; of German Powers, *ib.* ; of the Netherlands, 209 ; of Denmark, *ib.* Ambassador's Exemption from Taxation, and Duties upon Articles imported for his own use, *ib.* Different Nations have different Regulations respecting, 210. Roman Law in regard to Immunity *not* extended to *real* Property, *ib.* ; nor to Personalty unconnected with ambassadorial Character, *ib.* ; seldom to Tolls, Postage, &c., *ib.* House of Ambassador inviolable, *ib.* His Carriage, 211. Hotel of, Asylum for Offenders, *ib.* Case of Ripperda, Minister of Philip V., Refugee to

Hotel of English Ambassador at Madrid, 212. Ditto, Springer, Swedish Merchant, Refugee to Hotel of English Ambassador at Stockholm, 213. Purchase of Residence for Ambassador in foreign Country, ib.

Religion.—Ambassador's Right to exercise the Rights of his own Religion, ib. Confined to himself, his Suite, and fellow countrymen, 214. Language in which religious Service to be performed, ib. By Chaplain in the Hotel of Ambassador, sanctioned by international Usage, on certain Conditions, ib. Protestant Chapels of Ambassador at Vienna ordered by Joseph II. to be closed, ib.

Different Classes of Public Ministers, 216. All enjoy privileges, 218. Legates *à latere* distinct from Nuncios, 218, 440, 441, 442.

Ordinary and Extraordinary, 219. Diplomatic Agents of the first Class, ib.; of the second Class, ib.; of the third Class, ib.; of the fourth Class, 220. Ceremonial Honours due to, ib. States may confer what Rank they please upon their Ambassador, 222. Not restricted as to Number, Sex, Religion, &c., ib. May be accredited to various States at the same Time, ib. Power to negotiate with foreign States without Appointment to any particular State, ib. May be accredited by a third State to mediate between two other States, ib. Status of mere Agents, 223; of Deputies, ib. Cardinal Ambassador, double Allegiance of, 278. Where triable, 438, 439, 440.

Instructions.—*Letters of Credence*.—Character of Ambassador recognized on production of them, 225. To whom addressed, 226. Nature of Contents, ib. One Letter may suffice for several Ministers of the same Rank, ib. Minister sometimes furnished with several, ib. Rank of Minister changed, fresh Letters required, ib. Full Power for negotiating, a separate Instrument, ib. Full Power founds the Authority of Minister as Representative of his Sovereign, 227. May be general or special, ib. Extent of, when special, 228. When granted to several Persons, ib.

Arrival.—*Audience*, 229. Notification of Arrival, ib. Audience with Sovereign may be public or private, ib. Letters of Credence delivered at,

ib. When Diplomatic Agent of the second or third Class, 230; of the fourth Class, ib. Custom in republic States, ib. Rule of Etiquette between diplomatic Agents at same Court, ib. Alteration of Ceremonies by Sovereign of Foreign Court, 231.

Mission of, 231. May be altered in its Character, ib.; suspended, ib.; closed, ib. Causes which alter, 232; suspend, ib.; end, ib. Custom on Recall of Ambassador, 233. Death of, ib.

America, North.

United States of.—Decision in as to Recognition of States, 26. Case in Supreme Court of, respecting Treaty of Peace with Great Britain, 108. Regulations as to Consuls put forth by, 259.

Central and Southern.—Republics in, Members of the Community of States, 59.

Dependencies.—*Jus legationis* granted to European Governors of, 143.

Anne 7, cap. 12. Decisions on this Statute as to Privileges of Ambassadors from Arrest and Process, 198.

Amiens, Peace of, 21.

Annuaire des deux Mondes, 396.

Annual Register. See Register.

Appendix. See Contents of, at End of this Volume.

Ariosto, Orland. Fur., 287.

Arundel (Lord,) Letter by, to Mr. Plumptre on the Bull "In Cœna Domini," 330. Letter to, on Ditto, ib. Apocrisarius, 167.

Asylum, Ambassador's Hotel used as, 211.

Audience of Ambassador at foreign Court, &c., 229.

Austria, Recognition of Title of, in 1806, 30. Attempt of, to open the Navigation of the Scheldt, 38. Reasons of withdrawing her Ambassador from Rome in 1814, ib. Treaty with Ottoman Porte for Equality of Rank, 49. Enactment of as to Privileges of Ambassador, 208. Complaint of Emperor of, respecting Correspondence with French King as to German Princes in Alsatia, being in French Language, 53. Treaty of Alliance with France, ib. Guarantee of, that the Successors to British Throne after Death of Queen Anne should be Members of the Church of England, 75. Law of, as to Privileges, &c., of Ambassadors, 208. Papal Relations with Rome, 371.

B.

- Bacon (Lord,) 113.
 Bacon's (Matthew) Abridgment, 79.
 Baden, Treaty of (1714,) 52.
 Baldwin's (American Reports.) *See* Reports.
 Balguerie, *Affaire de la Maison, de Bordeaux contre le Gouvernement Espagnol*, 126.
 Barbary, Ordonnances of France, respecting Consuls in, 259.
 Barbeyrac, 109, 111, 266.
 Barbut, Case of, in Chancery, 263.
 Bartolus, 46.
 Bass (M. de,) Case of, 180.
 Bavaria, Provisions of, as to exemption of Ambassadors from ordinary Jurisdiction of Tribunals of, 209. Papal Relations with Rome, 395.
 Belgians, Case of the Secretary of Legation of. *See* Drouet, M.
 Belgium, Recognition of Independence, 24. Member of Community of States, 59. Separation of, from Holland, 78. Papers, Letters of Austria, Russia, Prussia, and England, respecting, *ib.*
 Benedict XI., 319, 321.
 Bentinck (Lord George,) Motion of, in the House of Commons respecting Debts due from foreign States, 11.
 Berlin, Treaty of 66.
 Berne and Freyberg, Cantons of, *Pays de Vaud*, hypothecated to, by House of Savoy, 69.
 Berne, (City of,) in Switzerland, v. Bank of England, 225. *See* List of Cases cited.
 Berthold, Duke of Zahringen, 307.
 Bingham's Reports, 26. Antiquities of the Christian Church, 288.
 Bishops, Powers of, 278.
 Blackstone, Commentaries, 46, 174, 205.
 Bodinus, *De Republica*, 46.
 Boniface (St.) Archbishop of Mayence, 293; the Eighth, 305, 312, 318, 320.
 Bossuet, *Declaratio Cleri Gallicani*, 336.
 Botschafter, 216.
 Bougeant (Père,) *Histoire du Traité de Westphalie*, 357.
 Bourbon, House of, 22.
 Bowyer's Readings, 82, 325.
 Boyer's Annals of Queen Anne, 205, 206.
 Bramhall's (St. Just.,) *Vindication*, 288.
 Brazil, Regulations of, respecting Consuls, 259.
 Breslau, Treaty of, 66.

- Bristol, Bishop of, Plenipotentiary at Peace of Utrecht, 222.
 British Government. *See* Great Britain.
 Broom's Legal Maxims, 79.
 Buckingham (Duke of,) Libel against, by Inoyosa and Colonna, Spanish Ambassadors, 179.
 Bull, In Cœna Domini. *See* In Cœna Domini.
 Bullæ Circumscriptionum, 397.
 Bullarii Romani Continuatio, S. Pontificum Clementis XIII., Clementis XIV., Pii VI., &c., collegit And. Adv. Barberi, tom. 1—10, in 7 vols., folio. Rom.: 1835—45. Tom. 1, 2 3, Clemens XIII.; tom. 4, Clemens XIV.; tom. 5—10, Pius VI. 330.
 Bullarium Magnum Romanum, a B. Leone Magno, usque ad S. D. N. Benedictum XIII., cura et studio L. et A. M. Cherubini, *edito novissima, juxta exemplar Romæ*, 19 tom. in 16, folio. Luxemb.: 1727—58, 330.
 Burke, Tracts on Popery Laws, 105, 418. Speech on Bill for the Relief of Protestant Dissenters, 284.
 Burleigh (Lord,) State Papers of, 139, 176, 178.
 Burn's Ecclesiastical Law (ed. Phillimore,) 275, 414.
 Burrow's Reports. *See* Reports.
 Butler's Historical Memoirs of the Roman Catholics, 420.
 Bynkershoek, *De Dominio Maris*, 39, 40. *Quæstiones Juris Publici*, 39, 40, 44, 49, 143, 144, 149, 150, 151, 152, 210, 279, *De Foro Legatorum*, 117, 120, 121, 122, 124, 131, 134, 135, 150, 151, 157, 158, 159, 160, 164, 165, 167, 172, 174, 175, 176, 181, 188, 189, 191, 192, 193, 194, 195, 196, 197, 210, 216, 217, 225, 227, 261, 278. *De Relig. Peregrina*, 283, 279. *De Cultu Religionis Peregrinæ apud veteres Romanos*, 279.

C.

- Cabinet of scarce and celebrated Tracts, 5, 76.
 Cadiz, Governor of, Arrest of Dutch Consul by, 260.
 Cæsar, *de Bello Civili*, 145.
 Callièrs (De,) 15.
 Cambray, Peace of.—League, of, signed by Margaret of Austria in the Name of Charles V., 149.
 Camden's Elizabeth, 121, 139, 177, 178.
 Campo Formio, Peace of, 25.

- Canning (Mr.) Speeches of, 24. On the Independence of South America, 16, 17; on the Address of the King's Speech on Opening of Session (1822,) 19. Reply to Remonstrance of Spanish Minister on Recognition of South American Republics, 22. Administration of, 53.
- Canon Law. *See* Corpus Juris Canonici.
- Caraffa, Papal Legate; Henry II. of France absolved from Obligation of Oath by, 67.
- Cardinal Ambassador, double Allegiance of, 278, 437.
- Cardinals, how appointed, 431, Rank of, 436. Where triable for Offences, 437. *See* Papacy.
- Carriage of Ambassador, Privilege of Exterritoriality applies to, 211.
- Cases (cited.) *See* List at Commencement of this Volume.
- Castille, Council of, 212.
- Castro's (Gabriel Pereira de,) 386.
- Cellamare, Case of, for Conspiracy, 184.
- Ceremonials, Maritime, 39.
- Certificates, Consuls granting, 254. *See* Consuls.
- Chace (Judge of American Court,) Opinion of, respecting the Construction of Treaty of Peace with Great Britain, 108.
- Chalmers, Collection of Opinions, 115.
- Charlemagne, 295.
- Chargés d'Affaires, Class of Ministers, 220. Ceremonials due to, *ib.* Letters of Credence of, to whom addressed, 226. Arrival of, at foreign Court, notified to Minister for Foreign Affairs, 230.
- Charles I., 154.
- II., Ambassador of, rejected by France, 138.
- VI. (Emperor,) 75.
- VIII., 341.
- Charles-le-Martel, 293.
- Chateau Cambresis, Peace of (1559,) 67.
- China, Consuls in the five free Ports of, 274. Powers of Ditto, *ib.*
- Christian Countries, modern Consulates in, 240.
- Christianity. *See* Church—Religion.
- Christina, ex-Queen of Sweden, 131.
- Chrysostom (St.), 278.
- Church (Christian,) Connection with State, 281. *Collegium licitum*, 285. Under Constantine, 286. Identity of, with State, 297. Collision between, and State, 302. *See* Religion.
- Cicero, de Officio, 57, 85. De Finibus, 89. De Invent., 92. Phil., 145. In Verrem, 189. De Leg., 281, 282, 283. De Div., 283.
- Civilians, Opinions of, on certain Questions relating to Privileges of Ambassadors, 139. On Ambassador aiding in Treason against Sovereign to whom sent, 176.
- Civil Jurisdiction, Exemption of Ambassadors from, in Countries to which accredited, 190.
- Clarendon (Lord) Remarks of, in House of Lords, as to Treaty between Austria and the Porte (July 22, 1853,) 65.
- Clement V., 305, 321, 322, 335.
- VI., 334.
- VII., 67.
- Clementinæ. *See* Corpus Juris Canonici.
- Clothaïre, Constitution of 300.
- Code. *See* Roman Law. Napoleon, 207. De Commerce (French), 259.
- Coke's Reports, 415. *See* Reports.
- Coke (Lord,) Institutes, 154, 174.
- Colletta, Storia del Reame, di Napoli, 386, 387.
- Collier's Ecclesiastical History of Great Britain, 303, 417, 418.
- Collision of Treaties, 111. *See* Treaties.
- Colonna (Spanish Ambassador,) Case of, for Libel against Duke of Buckingham, 179.
- Colours, Orders of British Crown to Ships of War as to, 43. Penalty for hoisting prohibited Colours, *ib.* Case of the Master of the Steamship *Lord of the Isles*, for carrying illegal Colours, *ib.*
- Comity, with respect to commorant Foreigners, 4.
- Comyns, 174.
- Concordata, German, 344. *See* Papacy. History of, 358.
- Confiscation of Debts due to British Subjects by French Government, 13.
- Confirmation of Treaties, Modes of, 65.
- Congress of Vienna. *See* Vienna.
- Congresses, at which Sovereigns and Representatives have met, 45.
- Consolato del Mare, 236.
- Constantine, Patriarchate of. *See* Religion.
- , Church under, 286. Division of the Roman Empire by, into four Prefectures, *ib.*
- Constantinople, English Ambassador

at, Case of, 180. Patriarchates of, 287.

Consuls.

Historical Introduction, 235. Character and Functions imparted to, ib. Institution of Consulates, ib.

Modern Consulates in Christian Countries, 240. Not strictly speaking Public Ministers, ib. Entitled to special Protection, ib. Not entitled to Privileges, &c., of a *Representative of State*, ib. Not furnished with Credentials, except when also *Chargés d'Affaires*, 241. Cannot enter upon their Duties without Permission of Sovereign to whom deputed, ib. Amenable to criminal and civil Jurisdiction of foreign State, ib. Subject to Payment of Taxes, 242. Places of Worship in their House, rarely accorded, ib. No Claim to foreign Ceremonial, and no Right of Precedence, ib. Arrest and Imprisonment of, 242. Case of Imprisonment of Mr. Pritchard, British Consul at Tahiti, by French Commandant, 243. Privileges of, 244. Extent of their Jurisdiction, 245. Refusal of State to receive, no Breach of International Law, ib. Entitled to same Privileges as his Predecessor, 246. State bound to give Notice of its Intention to alter Privileges to, ib. Authority of, derived from Instruments appointing, &c., ib. Consul trading, ib. Natives of the foreign State sometimes appointed, ib. Consuls General sometimes appointed, ib. Extent of their Functions, ib. Consuls and Vice Consuls under their Control, ib. Appointment of Vice-Consuls, who by, ib. Who they correspond with, ib. Treaties relating to, List of, 249. Usage of Nations derived from said Treaties, ib. Treaties illustrating *Status* of Consuls, ib.

Duties and Powers of, 252. Law of United States respecting Consuls, ib. (British) Authority and Powers entrusted by British Government to, ib. General Institutions issued by Great Britain as to, 253. Exequatur to, ib. Privileges of, 254. Advice and Assistance to be given to British Subjects by, ib. Directions to, respecting Offenders seeking Refuge on board of British Ships, 255. Precedence between Consuls and naval Officers, ib. Appoint-

ment of Vice-Consuls, 256. Consuls not to dismiss Vice Consuls without Sanction of Secretary of State, ib. Statutes relating to Powers of, 257. List of Vice-Consuls to be transmitted by, to Secretary of State each Year, ib. Granting Passports, ib. Fees of, Order as to, ib. Powers of, also to be found in Statute, 6 Geo. III. c. 78, ib. Power given to, by the Statute, 12 & 13 Vict. c. 62, to facilitate Marriages of British Subjects, ib. Provisions relating to, and Vice-Consuls, contained in Merchant Seamen's Act (7 & 8 Vict. c. 112,) 258. Ditto in Merchant Shipping Act (17 & 18 Vict. c. 104,) ib. Regulations respecting, promulgated by foreign Powers for the Direction of their Subjects, ib.

Decisions of Municipal Tribunals as to Privileges of, 260. Arrest of the Dutch Consul by the Governor of Cadiz, ib. Claim of the Dutch for Privileges of Ambassador to their Consul at Genoa, refused by Senate, ib. Quarrel between Republic of Venice and Papal Government, on account of Outrages on Consuls of Republic, 261.

(France) Decision of the Cour Royale de Paris (1833,) in the Case of M. Carlier d'Abaunza, Consul General of Uruguay, as to Exemption from Arrest, 262. Decision of the Cour Royale of Aix (1843) in the Case of M. Soller, ib.

(United States of North America), Civil Tribunals of, promulgated same Doctrines as that of France in Case of M. Soller, 263.

(England), *Barbuit's Case in Chancery*, Agent of Commerce from King of Prussia. Decision of Lord Chancellor as to Privilege from Arrest, 263, 264.

Triquet and Others v. Bath.—Decision of Lord Mansfield (1764,) as to Privileges of Secretary of Foreign Ambassador, 266.

Heathfield v. Clifton.—Decision of Lord Mansfield (1767), as to Privileges of Ambassador's Retinue, ib.

Clarke v. Cretico.—Decision of Sir J. Mansfield (1808,) Claim of Defendant to Exemption from Arrest, as Consul General from the Sublime Porte, 267.

Viveash v. Becker.—Decision of Lord Ellenborough (1814), that a

resident Merchant in London, who had been appointed and acted as Consul to the Duke of Oldenburg, not privileged from Arrest, 268.

Consul resident abroad, and Plaintiff in a Suit, considered by English Courts exempt from giving Security for Costs, 269.

Tribunals of International Law.—Doctrine held by, 269. Case of the *Indian Chief*, Decision of Lord Stowell (Prize Court, 1800), Claim for Exemption of Cargo, Property of American Consul, from Rights of Belligerent, 269. Same Doctrine promulgated by Prize Courts in United States, *ib.*

Consuls in the Levant.—Status of Consuls in Mahometan Countries, 271. Jurisdiction of, *ib.* Directions for the Guidance of, 273. Statute of 6 & 7 Vict. c. 94, as to Jurisdiction of Her Majesty in Countries out of her Dominions, 272; in China, 275.

Consuls, Vice. *See* Consuls.

General. *See* Consuls.

Consulates; Modern, in Christian Countries, 240. *See* Consuls.

Convention, as to Greece (30th April, 1833), 12; between Great Britain, King of the Netherlands, and Russia (19th May, 1815), 101. Ditto, Great Britain and Russia, 103. *See* Treaties.

Coppi, *Annali d'Italia*, 361—365.

Correspondence respecting the Arrest of Mr. Harwood (the Vienna Correspondent of the Morning Chronicle,) by Austrian Authorities, 3; respecting the Affairs of Rome, 1849 (presented to Parliament 1851,) 447; between Viscount Palmerston, the Marquis of Normanby, and Prince Castalcicala (laid before Parliament 1849,) as to armed Intervention, 448. International Language in which written, 52.

Corpus Juris Canonici, 305. Decretals inconsistent with the Independence of States, *viz.*, *Venerabilem*, 308: *Solitæ*, 309; *Ad Apostolicæ*, 312; *Clericis Laicos*, 319; *Quod Olim*, *ib.*; *Unam Sanctam* and *Meruit*, 321; *Romani Principes*, 322; *Pastoralis*, *ib.*; *Si Fratrum*, 323; *De Consuetudine*, *ib.* General Remarks on Decretals, 324. Bull, *In Cœnâ Domini*, 329. Provision of, 331. *See* Papacy.

PASSAGES REFERRED TO.

Corpus Juris Canonici.

Decreti Primâ Pars.	Page
Dist. xv. c. i. s. 1,	315.
" xxii. c. i.	325, 430.
" xxiv. c. iii.	430.
" xxv. c. vi. s. 1,	444.
" l. c. lviii.	444.
" lxi. c. xiii.	430.
" lxxi. c. v.	430.
" lxxiv. c. vi.	430.
" lxxix. c. iii. v.	430.

Decretalia.

Lib. I. t. xxxiii. c. 6, (<i>Solitæ</i>)	309.
" I. t. vi. c. 34, (<i>Venerabilem</i>)	308.
" I. t. xxx. or, X., l. i. 30. (<i>De Off. Leg.</i>)	440.
" I. t. xxx. c. 8, or, c. viii; X. (<i>Ib.</i>)	440.
" I. t. xxx. cc. 3, 4, 6, 9, or, c. iii. iv. vi. ix. X. (<i>Ib.</i>)	440.
" II. t. i. c. 13 (<i>Novit ille</i>)	311.
" III. t. xxxviii. c. 20, or, c. xx. X, (<i>De Jure Patron.</i>)	440.
" V. t. xxxiii. c. 23, or c. xxiii. X. (<i>De Privileg.</i>)	440.

(*Sexti Decret.*)

Lib. I. t. xv. c. 1, or, c. i. VI. (<i>De Off. Leg.</i>)	440.
" II. t. xiv. c. 2, (<i>ad Apostolicæ</i>)	312.
" III. t. xxiii. c. 3, (<i>Clericis Laicos.</i>)	319.

(*Clementinarum.*)

Lib. II. t. ix. (<i>De Jurejurando</i>)	322.
" II. t. xi. c. 2, (<i>De Sententiâ et re judicatâ</i>)	322.

(*Extravagantes.*)

Joan xxii. t. v. (<i>Si Fratrum</i>)	323.
--	------

(*Extravagantes Comm.*)

(Lib. I. t. i. c. 1, <i>De Consuetudine</i>)	323.
I. t. viii. (<i>Unam Sanctam</i>)	320.
III. t. xiii. (<i>Quod Olim</i>)	319.
V. t. vii. c. 2.	321.

Cotton's (*Sir R.*) Remains, 179.

Council of Trent. *See* Trent.

Councils, Œcumenic or General, Division of, 314

Cour Royale of Aix, Decision in the Case of M. Soller, 262.

Cour Royale de Paris, Decision of, in the Case of M. Carlier D'Abaunza, Consul General of the Republic of Uruguay, 261.

Cracow, Debates on, 101.
 Cranch's (American) Reports, 27. *See* List of.
 Credence, Letters of, 225. Public Character of Minister recognized on Production of, 226. To whom addressed, *ib.* Nature of Contents of, *ib.* Same Letters may suffice for several Ministers of same Rank, *ib.* Minister furnished with several, *ib.* Full power not inserted in, &c., *ib.* Not granted to Consuls except when also *Chargés d'Affaires*, 241.
 Criminal Law, Exemption of Ambassadors from, in foreign Countries, 173.
 Cromwell, 48. Ambassador of, admitted by France, 138.
 Crusaders, the, respect Character of Ambassadors, 168.
 Cajacius, Jacobus, 160.
 Cyprian, (St.,) *De Unitate Eccles.*, 641.
 Cziráky, *Conspectus Juris Publici Regni Hungariæ*, 375.

D.

D'Abaunza (M. Carlier,) Decision of *Cour Royale de Paris*, in the Case of, 261.
 Dallas's American Reports, 109. *See* Reports, List of.
 D'Aguesseau, 278, 362.
 D'Aleth, 36.
 Dante, *Inf.*, 287.
 Death, of Sovereign, Ambassador's Mission ended, 232; of Ambassador, during Mission, 233.
 Debates, on Affairs of Greece and Don Pacifico, 3; on Foreign Enlistment Bill, 27.
 Debts of a State, 1, 8. Letter of Lord Palmerston on, 9. Confiscation by French Government of, due to British Subject, 13.
 De Bass (M.,) Minister from France to Cromwell, Case of, for Conspiracy, 180.
 Decisions, of Municipal Tribunals (France and England,) as to Privileges, &c., of Consuls, &c., 260. Of International Tribunals, ditto, 269. Of American Courts, 263, 270.
 Decretalia. *See* *Corpus Juris Canonici*.
 Decretum. *See* *Ib.*
 De Maistre, 327.
 Denmark, Claims to maritime Honours with respect to Ships entering the Baltic, 44. Treaty with Russia with respect to Ditto, 45. Treaties with European Powers with reference to

Duchies of, 75. Law of, as to Privileges of Ambassadors, 209. Regulations of, respecting Consuls, 259. Papal Relations with, 406.
 De Pamiers, 361.
 De Pradt, 337, 339, 340, 341, 342, 343, 358, 359, 363, 369, 370, 371, 396, 397.
 Deputies appointed by Governments to foreign Countries, Status of, 222.
 De Real, 184.
De Salute (Papal Bull,) 399.
 De Torcy, *Mémoires*, 227.
 Dethronement of Sovereign, Ambassador's Mission ended, 232.
 Deutsch oder Russisch, Pamphlet, 297.
 Digest. *See* Roman Law.
 Dionysius Halicarnassensis, 283.
 Diplomatic Agents. *See* Ministers (Public,) Ambassadors, &c.
 Dirksen, *Manuale Latinatis fontium Juris Civilis Romanorum*, 338.
 Dod's Roman Catholic History, 420.
 Dodson's Admiralty Reports, 26, 272. *See* Reports, List of.
 Dolder v. Bank of England, 25. *See* Cases, List of, referred to.
 Domat, 79.
 Domiciled Foreigners, Rights and Liabilities of, 6.
 Donellus, *De Jure Civili*, 79, 84, 85, 88, 91.
 Dresden. Treaty of, 66.
 Drouet (M.,) Secretary of Legation of the King of the Belgians, Actions brought against him in English Court on Commercial Transaction, 202.
 Dubois (Cardinal,) Triple Alliance of La Haye (1717,) negotiated by, during the Minority of the Duke of Orleans, 141.
 Duck, *de Usu et Auctoritate Juris Civilis*, 27, 46, 52.
 Du Cange (*Apocrisarius*), 167, 339.
 Dumont, 20, 73.
 Dunkirk, Destruction of the Port of, 87.
 Dupin, *de Ant. Eccles. Disciplinâ, Diss. Historiæ*, 290.
 Durand de Maillane's *Dictionnaire de Droit Canonique*, 314, 329, 334, 340, 344, 350, 360, 429, 431.
 Dutch Consul, arrested by the Governor of Cadiz, 260.
 Duties, Import, Exemption of Ambassador from, 209.

E.

Ebenders, *Was ist ein Bischof?* 373.

Ecclesiastical Titles. *See* Titles.
 Edward's Admiralty Reports, 26. *See* Reports, List of.
 Egyptians, clothed Functions of Ambassador with religious Character, 161.
 Eichhorn, Kirchenrecht, 338, 344, 345, 348, 371, 373, 374, 394, 395, 398, 399.
 Elizabeth (Queen,) Excommunication of, 416.
 Ellenborough (Lord,) 114; 133, 260, 268.
 Embassy, 134—190. Secretary to, distinct from general Suite, 197. *See* Ambassador.
 England, Commonwealth and Protectorate of, 21. Papal Relations with Rome, 412. *See* Great Britain.
 Enlistment (Foreign) Bill, Debate on, 27.
 Ensign. *See* Colours.
 Envoys, what Class of Ministers, 219.
 Equality of States, Rights incident to, 1, 33.
 Eugenius IV., 336.
 Evans' Translation of Pothier, 94.
 Evidence, Acts of foreign State only proved by an examined Copy on Oath, 114.
 Exequatur of Consuls, 241—253. *See* Consuls.
 Exmouth (Lord,) Demand for Compensation from the Dey of Algiers for Injuries done to British Consul, 242.
 Extraterritoriality, Rights to, by Sovereigns, 123. *See* Sovereigns. Of Ambassadors, 156, 190. *See* Ambassadors.
 Extravagantes. *See* Corpus Juris Canonici.
 Eybel, Was ist der Papst? 373.

F.

Farini, Lo Stato Romano, 429—431.
 Fees, Consular, Order in Council (1851) regulating, 257.
 Felix V. (Pope,) 336.
 Fénélon, 55.
 Ferdinand, of Arragon, 277.
 Ferreira (Pinheiro,) 220, 223.
 Flag. *See* Colours.
 Flassan, 88, 130, 240.
 Fleury, Hist. Eccles., 329.
 Foelix, 118, 134, 189, 207, 208, 209, 240, 269.
 Forcellini, Lexicon, 167.
 Foreign, Enlistment Bill, Debate on, 27. Spiritual Powers, international Status of, 287. States, Acts of, how

proved, 114. Relations of Papacy with, 358. *See* Papacy.
 Foreigners, their Right to Protection, 3. Difference between domiciled Foreigners and Visitors, 6.
 Fox (Charles James,) Speech of, on the Russian Armament (1792,) 55.
 France, her Conduct in Conflict between Great Britain and North American Colonies, 18. Recognition of Consulate of, by Great Britain, 21. Revolutions of, 23. Claims of maritime Honours in a Portion of the Mediterranean, 44. Claims Precedence in Rank over other States, 49. Guarantees Succession of Princess Sophia to British Throne, after Death of Queen Anne, 75. Treaty between, and Hanse Towns (1716) as to Places of Worship in the House of their Consuls, 242. Law of, as to Privileges and Extraterritoriality of Ambassadors, 207. Ordonnances of, respecting Consuls in Christian Countries, 258; respecting Consuls in Barbary, 259. Papal Relations with, 358.
 Francis I., absolved from Obligation of Oath by the Papal Legate Caraffa, 67. Ambassadors of, to Venice and Constantinople, arrested and executed passing through Milan, 187.
 Francis II., 344.
 Frankfort, Decree of the Diet of (1338,) 335.
 Frederick I., of Prussia, Assumption of royal Title, 29. Secured Safety of Papal Legates, 168.
 Frederick II., 312.
 Full Power, 226. *See* Ambassadors, Letters of Credence, &c.
 Fynn's British Consul Abroad, 240, 242, 245, 247, 253, 273, 274.

G.

Gaius, 81.
 Gallison's (American) Reports, 289. *See* Reports, List of.
 Garden (De,) Traité de Diplomatie, 131, 171, 172, 173, 175.
 Gazette des Tribunaux, 126, 127, 196, 262.
 Gelston v. Hoyt, Case of, 27. *See* Cases, List of.
 Genoa, Claims of maritime Honours in the Ligurian Sea, 44. Dutch Consul at, Claims to ambassadorial Privileges for, refused by Senate, 260.
 Gentilis (Albericus,) 129, 134, 160, 161, 163, 195, 196.

George II., 272.

— III., Proclamation of, as to
Flags and Colours carried by Ships,
&c., 43. Right of sending Embassy,
vested in Prince of Wales, during
Incapacity of, 141, 272.

George IV., Statute of (Year 6, c. 78.)
as to Powers of Consuls, 257.

German Protestant States, Papal Re-
lations with, 401.

Germany, Emperors of, Titles of, 28.

Giannone, Ist. de Napoli, 329, 387.

Gibbon's Decline and Fall of the Ro-
man Empire, 52.

Giesler, Lehrbuch der Kirchenges-
chichte, 348.

Gioberti, Introduzione allo Studio
della Filosofia, 380.

Government, Debts of, 1.

Grant (Sir Wm.,) Judgment of, as to
Debts of a State, 13.

Great Britain, Conflict between, and
North American Colonies, 18. Her
Refusal to recognize Republic of
Ditto (1792), 21. Claims of mari-
time Honours in the narrow Seas,
44. Treaties with Holland as to
maritime Honours, 45. Convention
(1815) with the King of the Nether-
lands and Russia, as to the Russo-
Dutch Loan, 102. Convention with
Russia (1831,) as to ditto, 103.
Treaty with Sweden (1666,) forbid-
ding the lending the Ships of the
one for the Use of Enemies of the
other, 112. Powers entrusted by, to
Consuls, 253. Subjects of, Advice
and Assistance to be given to, by
Consuls, 254. *See* Consuls. Ships
of, Protection on board of, 255.

Greece, Debates on Affairs of, 3. Re-
cognition of Independence of, 24.
Papers relative to the Affairs of, ib.
Treaty of Guaranteeship (1832)
concerning, 77. Member of Com-
munity of States, 59. Regulations
of, respecting Consuls, 259. Care
of Religion committed to Magis-
trates, 282. Papal Relations with
Rome, 401.

Gregory IX., 305.

— the Great, (Pope,) 292, 449,
450. Decretals of. *See* Corpus Ju-
ris Canonici.

Gronovius, 277.

Grotius, de Jure Belli et Pacis.

PASSAGES CITED FROM.

(Prolegomena.)

Proleg. 51.

Lib. I. t. iii. s. 13.

Page
315.

277.

Lib. II. t. iii. 13. 295.

" II. t. xi. 55.

" II. t. xi. 12, 13. 65, 227.

" II. t. xii. 55.

" II. t. xiii. 55.

" II. t. xiii. 1. 67.

" II. t. xiv. 67.

" II. t. xiv. 1. 60.

" II. t. xv. 5. 55.

" II. t. xv. 8—12. 61.

" II. t. xvi. 55, 79.

" II. t. xvi. 1. 80.

" II. t. xvi. 10. 109.

" II. t. xvi. 13. 86.

" II. t. xvi. 20. 88, 96.

" II. t. xvi. 25. s. 2. 99.

" II. t. xvi. 29. 111.

" II. t. xvii. 18, 19. 62.

" II. t. xviii. 134.

" II. t. xviii. 1. 157.

" II. t. xviii. 2. 144.

" II. t. xviii. 3. 148, 154.

" II. t. xviii. 4—5, 117, 157, 174.

" II. t. xviii. 4—6. 175,

" II. t. xviii. 4, 7. 99.

" II. t. xviii. 5—1. 175.

" II. t. xviii. 6. 188, 191.

" II. t. xviii. 8. 2. 172.

" II. t. xviii. 9. 212.

" II. t. xviii. 10. 171.

" II. t. xx. 44, 3. 124.

" II. t. xx. 48. 278.

" II. t. xx. 48. 61.

" II. t. xxii. 14. 277.

" II. t. xxv. 3.

" II. t. xxvi. 4—4. 278.

" III. t. ii. 1.

" III. t. ii. 1, 2. 14.

" III. t. ii. 5. 5.

" III. t. ii. 7. 7.

" III. t. xx. 33. 86.

" III. t. xxi. 16. 232.

Grotius, de Imperio Summarum Potes-
tatum circa Sacra, 281—291.

—, Tract. de Leg., 291.

Guarantee, Treaties of, 70. *See*
Treaties.

Guidekens (Col.,) English Ambassa-
dor at Stockholm, 213.

Gunther, 33, 49, 50, 69, 118.

Gustavus, Adolphus, 141.

Gyllenburg (Swedish Ambassador,)
Case of, for Conspiracy, 181.

H.

Haggard's (Admiralty) Reports. *See*
Reports, List of.

Hale's Pleas of the Crown, 174—183.

Hallam's Constitutional History of
England, 131.

- Hanau (Gazette de,) 404.
 Hanover, Title of King of, recognized, 30. Treaty of (1725,) between Great Britain and Prussia, 73. Papal Relations with Rome, 397. Oath of Allegiance to be taken by Roman Catholic Bishops in, Form of, 400.
 Hansard's Parliamentary Debates, 12, 101, 106.
 Hanse Towns, Treaty with France (1716,) as to Places of Worship in House of Consal, 242, n.
 Haslang, Count (Bavarian Ambassador,) Claims of Privileges by Persons, as Servants of, 199.
 Heffters, 1, 3, 15, 27, 28, 33, 36, 55, 65, 118, 120, 122, 124, 131, 134, 135, 151, 153, 154, 156, 167, 172, 210, 217, 219, 221, 223, 225, 226, 237, 240, 263.
 Hegel, 25.
 Henry II., 67.
 ——— III., 298, 313.
 ——— IV., 298.
 ——— VI., 307.
 ——— VII., 154.
 ——— VIII., Excommunication of, 416.
 Hermann Delong, Case of, 262.
 ——— of Luxemburg, 303.
 Hertslet's Commercial Treaties, 58, 102, 213.
 Hesse, Elector of, Refusal by five great Powers to recognize his Title of King, at Congress of Aix la Chapelle, 31.
 Hesse Cassel (Landgrave of,) Ambassador of Holland at Court of, accused of Maladministration of a testamentary Trust, 173.
 Hesse Cassel, Passport to Minister of, at France, Refused for Nonpayment of Debts, 200.
 Hilliger, 123.
 Hoey (M. Van), Case of, 182.
 Hoffmann, 64.
 Holdernesse (Earl of,) English Ambassador to Venice, Arrest of, by Austrians, 181.
 Holland, Guarantee of, for Succession to British Throne after Death of Queen Anne, 75.
 Holstein, Duke of, Envoy Extraordinary of, 194.
 Honour and Respect, Marks of, between States, 33.
 Hooker's Ecclesiastical Polity, 289, 318.
 Hostages, 68.
 Hotel of Ambassador, Inviolability of, 210, Use of, as an Asylum for Refugee Offenders, 211. Purchase of, for Ambassador, sometimes sanctioned by Nations, 213. Ambassador's Right to enjoy Rites of his his own religion within Precincts of, 214.
 Huber, 124.
 Hubertsburg, Treaty of, 66.
 Huberus, 155, 175.
 Huc (M.,) Voyage dans le Thibet, 301.
 Hume (Mr.,) Motion in House of Commons, (1834,) respecting Russo-Dutch Loan, 105.
- I.
- Ihering, Rudolph, 162.
 In Cœnâ Domini (Papal Bull,) 329.
 Papers relating to, 330.
 India, British Governor General of, 143.
 Innocent III., 307.
 ——— IV., Frederick II., deposed by, 302.
 Inoyosa and Colonna (Spanish Ambassadors,) Case of, for Libel against the Duke of Buckingham, 179.
 Institutes. *See* Roman Law. Coke's, 154, 174.
 Instructions for Ambassadors, 225. *See* Ambassadors.
 Insults to States, 35. To outward Insignia of States, 37. To neutral Flag of Ditto, 38.
 International Law, Decisions of Tribunals of, as to Privileges of Consuls and Ambassadors, 269.
 Internuncio, what Class of Minister, 219.
 Interpretation of Treaties, 79. *See* Treaties.
 Inviolability of Ambassadors, 160. *See* Ambassadors.
 Ireland, Union with, Proclamation of George III., with respect to Colours, to be carried by Merchantmen of United Kingdom, 43.
 Israelites, Inviolability of Ambassadors acknowledged by, 161.
- J.
- James II., Recognition of Son of, represented by Great Britain, 21.
 Jarry (M.,) le President, 127.
 Jenkins (Sir Leoline,) Life of, 43, 45, 86.
 Jenkinson, (Mr., afterwards Earl of Liverpool,) Defence of the Conduct of Great Britain (in 1758,) respect-

ing the Protestant Succession to British Throne, 76.
 Jerusalem, Establishment of Bishopric of, 427.
 Jervis (Lord Chief Justice,) Decision of, in the Case of *M. Drouet* (Belgian Minister,) 202.
 John IV., (King of Portugal,) Ambassador of, admitted by England, 138.
 — XXII., 325.
 Joseph II., Emperor of Austria, 215, 299.
 Julius II., 57, 67, 277.
 Junius, Letters of, 34.
 Jurisdiction (Civil,) Exemption of Ambassadors from, 191; of Her Majesty in Countries out of her Dominions, 272.

K.

Kainardgi, Treaty of 1774 between Turkey and Russia, 135.
 Kaltenborn, Grundsätze des Praktischen Europäischen Seerechts, 240.
 Kent, Commentaries of, 240, 252.
 King (the) v. Benson, Case of. *See* Cases, List of.
 Klinkhammer, 58.
 Klüber, 15, 27, 29, 33, 39, 41, 49, 51, 52, 55, 59, 60, 61, 62, 63, 65, 66, 68, 69, 72, 118, 120, 124, 130, 131, 134, 135, 141, 147, 156, 157, 171, 172, 175, 188, 193, 216, 217, 220, 222, 223, 227, 231, 279, 399.
 Knapp's Privy Council Reports, 14.
 Koch, 53, 58, 295, 296, 297, 298, 299, 301, 303, 335, 336, 345, 368, 432.

L.

L'Aubespine (French Ambassador,) Case of, for Conspiracy, 177.
 Laybach, Congress of (1821,) 45.
 La Haye, Triple Alliance of (1717,) 141.
 Lamberty, Memoires, 227.
 Language employed in Treaties, &c., 52.
 Languedoc, Negotiation by France (1704,) through Mediation of England, with Reformers of, 145.
 Laurent, Hist. du Droit des Gens, 283.
 Leber, Pièces relatives à l'Histoire de France, 329.
 Legate (Papal) Provincial, 196. A latere, distinguished from Nuncios, 218—440. Missi or Nuntii, 441. Nati, 442.
 Legation, Secretary of, Privileges of Extritoriality to, 197.
 Leibnitz, 286, 335.

Leo III., 296.

— X., 67.

Leopold II., (Emperor of Austria,) 53.
 Lequeux, *Manuale Compendium Juris Canonici*, 287, 296, 340, 351, 359, 360, 361, 368, 371.

Leslie (Bishop of Ross,) Ambassador of Mary Queen of Scots, 139, 165, 176, 177, 222.

Letters of Credence. *See* Credence.

Levant, Consuls in, Status and Jurisdiction of, &c., 271. Statutes, relating to, 272.

Libels on States, 35.

Liege, Bishop of, 198.

Liverpool (Earl of) Remarks of, in Discourse on the Conduct of Great Britain in respect to neutral Nations, 76.

Livy, 282.

Locré, *Legislation Civile*, 207.

London Merchants, Petition of, to *Lord of the Isles* (Steamship,) Case of House of Commons, 17. (n) the Master of, for wearing illegal Colours, 43.

Lorieux, cited, 302.

Louis XI., 186, 277, 341.

— XII., 341.

— XIII., 359.

— XIV., 53, 150, 359, 361.

— XVI., 53.

Louisa of Savoy, 150.

Lyons, Councils of, 314.

M.

Mably, *Droit Public*, 27, 28.

Mackintosh (Sir J.) *Miscellaneous Works*, 19. Speech on the Recognition of Spanish American States, 20, 21, 34.

Madrid, Treaty of (1526,) between Francis I. and Charles V. confirmed by Oath, 67.

Manilla, the Case of, 26.

Mansfield (Lord,) 198, 266, 267.

Marca (Petrus de,) *de Concordantiâ Sacerdotii et Imperii sui de Libertatibus Ecclesiæ Gallicanæ*, 350.

Maréchale de Guebriant, sent to Poland to conduct the Princess des Gouzaques, 150.

Maritime Ceremonials, 39. To whom paid, *ib.* What they consist of *ib.* Who can claim them, 40. In open Sea, 41. Manner of paying by different Ships, *ib.* Ordonnance of King of France with respect to, 42. Regulations as to Colours, 43. British Merchant Vessels must salute

- Ships of the Navy, 44. In particular Seas, distinguished from open Seas, *ib.* Claim of Venice to maritime Honours in the Adriatic, 44; of Geneva in the Ligurian Sea, *ib.*; of France in Portion of the Mediterranean, *ib.*; of Denmark, with respect to Ships entering the Baltic, *ib.*; of Great Britain, with respect to Ships in the narrow Seas, 44. Treaties relating to, 45.
- Martens (De,) *Droit des Gens*, 1, 12, 28, 29, 33, 39, 40, 41, 46, 48, 51, 55, 64, 73, 75, 118, 120, 124, 125, 129, 130, 131, 134, 135, 147, 149, 157, 172, 193, 214, 218, 219, 220, 221, 222, 223, 225, 226, 227, 228, 229, 230, 241, 246, 258, 263. Causes Célèbres, 5, 15, 18, 30, 38, 131, 177, 181, 182, 185, 187, 201, 208, 213, *Rec. de Traité*, 53, 130, 250. *Nouv. Rec.* 174, 274, 364. *Droit des Gens*, 33, 37, 238, 242, 245, 246. *Manuel Diplomatique*, 51. *De la Religion et du Culte*, 279. *Le Guide Diplomatique*, 236, 240, 242, 259.
- (De) et De Cussy, 12, 24, 41, 42, 45, 51, 52, 240, 246.
- Marten V. 335.
- Martin (H.) *Histoire de France*, 363.
- Martin's (American) Reports, 109. *See Reports*, List of.
- Mason, *Vindiciæ Ecclesiæ Anglicanæ*, 290.
- Maule (Mr. Justice,) Decision of, in Case of *M. Drouet* (Belgian Minister,) 204.
- Mecklenburgh (Duke of,) Title of Grand Duke recognized, 31.
- Meisel, *Cours de Stile Diplomat*, 31.
- Mendoza (Spanish Ambassador,) Case of, for Conspiracy, 177.
- Mensch (De,) *Manuel Pratique des Consuls*, 259.
- Merchant Seamen's Act (7 & 8 Vic. cap. 112,) Provisions in, relating to Consuls, 258. Shipping Act (17 & 18 Vic. c. 104,) as to Powers of Consuls, 258.
- Merlin (Ministre Public,) 136, 137, 138, 141, 142, 143, 144, 145, 149, 152, 154, 155, 168, 172, 188, 189, 193, 195, 207, 210, 211, 217, 218, 219, 220, 230, 231.
- Milan, Governor of, Ambassador appointed by, refused by Swiss Cantons, 143.
- Miles' (American) Reports. *See Reports*, List of.
- Milman (Dean,) *History of Latin Christianity*, 300, 304, 327.
- Miltitz, 235, 237, 238, 239.
- Minerva*, The, 43.
- Ministers, Public, three Classes of, 51. Regulations for the Reception of, instituted by the United States of North America in 1783, 52. Privileges of, *See Ambassador*. Different Classes of, 216. Class distinguished by ceremonial Honours, 220. Rank of, how determined, 222.
- Miruss, 134, 147, 151, 153, 155, 157, 168, 170, 172, 188, 192, 210, 212, 217, 218, 219, 222, 223, 225, 226, 227, 228, 229, 230, 231.
- Mission of Ambassador, when altered, 231; when suspended, 232; ended, *ib.*
- Modern Consulates in Christian Countries, 240. *See Consuls*.
- Molesworth, Sir W., Speech of, on *Cracow*, 101.
- Monaldeschi, put to death by Christina, ex-Queen of Spain, 131.
- Montesquieu, *De l'Esprit des Lois*, 160, 175, 281, 286.
- Moser, *Die Gesandten nach ihren Rechten und Pflichten*, 222.
- Mühlenbruck, 79, 95.
- Müller's, *Furstenbund*, 304. *Reichstagstheatrum unter Friedrich III.*, 345.
- Municipal Tribunals, Decisions of, in Cases respecting Privileges of Ambassadors and Consuls, 259.
- Munro, President, Message of (December 1833,) 18.
- Munster, Peace of (1648,) 67. Privileges of Ambassadors waived at Congresses of, 197. Treaty of, Public Minister appointed by Spanish Ambassador to negotiate, 142.
- Muratori, *Annali*, 295.
- Muscovy, Ambassador of Peter the Great, Czar of, arrested in London for Debt, 205. Duke of, 397.
- N.
- Napoleon, Emperor, Title of, Recognition of, 28.
- Native*, The (Schooner,) Case of, for Contempt in not saluting H. M. S. *Semiramis*, 43.
- Naval officers, Precedence between Consuls and, 225.
- Navy. *See Royal Navy*.
- Netherlands, the Privileges as to Ambassadors of, 209.
- Newspapers, referred to: The Times, 11; Guardian, 367; Telegraph, 325;

Gazette des Tribunaux (French,) 262.
 Neyron, (P. J.,) de Vi Fœderum, 64.
 Niméguen, Treaties of, written in the Latin Language, 52.
 Noodt, (Ger.,) de Dissert Relig. ab Imperio, Jure Gentium, 279, 355, 356.
 Norfolk (Duke of,) put to death for Conspiracy, 176.
 Norway and Sweden, Papal Relations with, 406.
 Novellæ of Justinian. See Roman Law.
 Nuncios, distinguished from *Legates à latere*, 218.

O.

Oath, once taken as a Security for Performance of Treaty, 67. Of Allegiance to be taken by Roman Catholic Bishops in Hanover, Form of, 400.
 Œcumenical Councils, Nature of, 314. Subdivision of, ib.
 Officers, Naval. See Royal Navy.
 Oldenburgh, Duke of, Title of, recognized, 31. Claim of Consul of, (Becker,) for Exemption from Arrest, 268.
 Orleans (Duke of,) Triple Alliance of La Haye (1717,) negotiated by Cardinal Dubois, during Minority of, 141.
 ——— (Duchess of,) Treaty between France and England negotiated by, 150.
 Otho (Prince,) Treaty of Guarantee that Greece shall form a monarchical independent State, under Sovereignty of, 77.
 ——— the Great, 298, 307.
 Ottolan, 240.
 Ottoman Porte, Treaty with Austria for Equality of Rank, 49. Ancient Maxim of, with respect to Language of Treaties, 54. Papal Relations with Rome, 411.
 Oppenheim, 15, 25, 29.
 Oxenstein (Chancellor,) Government of Stockholm devolved upon, after Death of Gustavus Adolphus at Lutzen (1632,) 141. Nominates Grotius as Ambassador to France, who was refused by Richelieu, 142.

P.

Pacca (Cardinal,) Memoire del, 369, 370, 371.
 Packman, Lehrbuch des Kirchenrechts, 284, 321, 326, 430.

Palmerston (Lord,) Circular of, respecting Debts of Foreign States, 9. Reply of, to Lord L. Bentinck's Motion respecting British Bondholders, 11.
 Papacy, Increase of, after Death of Charlemagne, 298. Roman Church under Constantine, 299. Claims of the Pope, 309. Decretals in the Corpus Juris Canonici, and Principles contained therein at variance with International Law, 307. International Status of, between the Period of Promulgation of the Canon Law, and the Council of Trent, 334. Height of Papal Power, ib. Pragmatics and pragmatic Sanctions, beginning of, 337. Concordata between the Roman See and Independent States, 337. International Relations of Rome with the Church of France, 338. Pragmatic of St. Louis, 339. German Concordata with the See of Rome, 343. The Council of Trent, and its Effect upon International Relations, 348. After the Treaty of Westphalia, 352. International Relations of, with foreign States in which a Roman Catholic Church is established, during Period of Reformation and present Time, 358. Relations of, with France, 358. Monitorio di Parma, 365. Relations of, with Austria, 371; with Spain, 376; Portugal, 382; Two Sicilies, 387; Sardinia, 390; Tuscany, 393; Bavaria, 395. International Relations of, with foreign States in which a Protestant Church is established, 397; with Prussia and Hanover, 397; with German Protestant States, 401; with Saxony, 405; with Denmark, 406; with Sweden and Norway, ib.; with Wurtemberg, ib.; with Switzerland, 407. International Relations of, with States in which a Branch of the Catholic Church not in communication with Rome is established, 410. Relations of, with Russia, 411; the Porte, ib.; Greece, ib.; England, 412. The Electors, Ministers and Courts of the Pope considered in their Relation to foreign States, 428. Who can be elected as Pope, 429. Who can elect, 430. How elected, 433. Advice and Assistance to the, as to temporal Government of Kingdom, 435. Courts of, and foreign States, ib. Legates of the, 440. Deposition of, 443. Cardinals of, how appointed, 431. Where triable for Offences,

437. Pio Nono and Louis Philippe, 445. England and Rome, 448.
- Papal Government, Quarrel with Republic of Venice (1364,) on account of Outrages on Consuls of Republic, 361.
- Papers, Parliamentary:—Correspondence respecting Arrest of Mr Harwood, Correspondent of Morning Chronicle, by the Austrian Authorities at Vienna (1852–3,) (laid before Parliament 1853,) 3. Debates in Parliament on the Affairs of Greece and the Claims of Don Pacifico (June, 1850,) 3. Petition of London Merchants, presented to House of Commons by Sir J. Mackintosh, 17. Treaty of Amity, Commerce and Navigation between His Majesty and the United Provinces of Rio de la Plata (signed Buenos Ayres, Feb. 2, 1825, presented to Parliament, May, 16, 1825,) 24. Papers relative to the Affairs of Greece (published in London, 1835,) ib. Report from the Select Committee on Consular Establishments, laid before Parliament 10th Aug., 1835, 240. Papers laid before Parliament respecting Her Majesty's Jurisdiction in the Levant (1845,) 271. Papers laid before Parliament as to Bull *In Cœna Domini*, Requisition of the Attorney General Seguier, 330. Correspondence relating to the Affairs of Rome (1849,) presented to Parliament 14th April, 1851, 447. Correspondence between Viscount Palmerston, the Marquis of Normandy, and Prince Castalcicala, laid before Parliament June 15, 1849, 448.
- Pappenheim (La Baronne de,) 196.
- Paris, Treaty of, 66.
- Parliamentary Papers, 374, 375, 377, 380, 381, 382, 383, 384, 385, 386, 389, 390, 392, 393, 394, 399, 400, 401, 402, 404, 405, 406, 407, 408, 410, 411. *See also* Papers.
- Parma, Monitorio de, 365.
- Paschal, (Pope,) Restoration of City of Rome to, 295.
- Pater Patratus, 163.
- Patriarchates of Constantinople, &c. *See* Religion.
- Pauli, Jos. de Riagger, Institutiones Jurisprudentiæ Ecclesiasticæ, 373.
- Pays de Vaud, Hypothecation of, by the House of Savoy, 69.
- Peel (Sir R.,) Speech of, on Debates on Cracow, 102. Remarks on Despatch of Lord Castlereigh (13th February, 1815,) respecting Russo-Dutch Loan, 106. Speech respecting Case of Mr. Pritchard, British Consul at Tahiti, 244.
- Penalty, for carrying prohibited Colours by Ships, 43.
- Pendant. *See* Colours.
- Pepin d'Heristal, 293.
- Pepin-le-Bref, 298.
- Peray (M. Michael du,) 342.
- Personality of Ambassador, Exemption from Civil Jurisdiction of foreign Country, 191.
- Peter the Great, Czar of Russia, Assumption of Title of, 29.
- Philip of Swabia, 307.
- II., Order of, with respect to maritime Honours, 41.
- III., of France, 318.
- IV., the Handsome, 319.
- Phillimore's (Burn's,) Ecclesiastical Law, 275, 413.
- Phillipp's Kirchenrecht, 296, 311, 313, 321, 335, 336, 346, 362, 371, 373, 374, 394, 398, 399, 400, 401, 402, 403.
- Philippines, Spanish Governor of the, 143.
- Pierre Pithou, 360.
- Pio Nono and Louis Phillippe, 445.
- Pius IX., 296.
- Plank, Geschichte der Christlich-kirchlichen Gesellschaftsverfassung, 292.
- Poland, Treaty with Prussia (1773,) 53. Pledged Crown Jewels to Prussia, 69.
- Polybius, 282, 283.
- Pomponius, 164.
- Pope, how elected, 433. Advice and Assistance to, in the temporal Government of Kingdom, 435. Roman Courts and Foreign States, ib. Deposition of, 443. Pio Nono and Louis Philippe, 445. For other Matters connected with, *see* Papacy, &c.
- Popery Law, Tracts on the (by Burke,) 418.
- Portalis (Jean Etienne,) 281, 304, 334. — (Vicomte Frederic,) 282, 327, 334, 356, 410, 428.
- Porte, Ottoman. *See* Ottoman Porte.
- Portugal, Revolt of, from Spain, 20. Law of, as to Privileges and Extritoriality of Ambassadors, 208. Papal Relations with Rome, 383.
- Pothier, Evans' Translation of, 79—89, 90, 98, 109.
- Power, full, 222. *See* Ambassadors, Credence, Letters of, &c.
- Powers of Consuls, 252. *See* Consuls.
- Pragmatic Sanction, 74, 337. *See* Papacy.

Præmunire, Statutes relating to, 413.
 Precedence, between Consuls and naval Officers, 255.
 Prefectures, Division of the Roman Empire into, by Constantine, 287.
 Prendergast, Law relating to Officers of the Navy, by, 43.
 Pritchard (Mr.), British Consul at Tahiti, Arrest of, by French Commandant, 243.
 Privileges, of British Consuls, 254.
 Proclamations, insulting, Right of Redress for, 35.
 Property of Subjects liable to Debts of State, 14.
 Protection, Right of Citizens to, in foreign Countries, 3; on board British Ships to Refugees, 255.
 Protestant Succession in England, Treaties of Guarantee relating to, 71, 75. States (German,) Papal Relations with Rome, 401.
 Provisoes, Statutes of, 413.
 Prussia, Enactments as to Privileges, &c., of Ambassadors, 209. Regulations as to Consuls put forth by, 259.
 Papal Relations with Rome, 397.
 Puffendorf, 79, 80, 95, 96, 109, 117.
 Putman, J. L. E., 52.
 Putter, 168.
 Puttlingen (De,) 208.
 Pythagoras, 161.

Q.

Quadruple Alliance (1718,) 52.
 Quintilianus, 87, 96, 111.

R.

Radstadt, Peace of, 53.
 Ranke, 294, 295, 369.
 Ratification of Treaty, 65.
 Ravenna, Archbishop of, 167, 295, n.; Exarchate of, 294.
 Rayneval (De,) *Instit. de Droit de la Nature et des Gens*, 279.
 Rechberger, Euchiridion, *Juris Ecclesiastici Austriaci*, 373.
 Recognition of States, 15. Occasion for its Application, 16. Of two Kinds, virtual and formal, 17. Of Titles of Dignity, 27.
 Recr ance, *Lettres de*, 233.
 Register, Annual, 38, 243, 244, 274, 275, 380.
 Reiffenstuel, *Jus Canon Univ.*, 329.
 Religion and the State, 278. How connected with the State, 279. Right of State to superintend within its territorial Limits all religious Doc-

trines, &c., 281. Influence of religion, *ib.* Collegium licitum of the Church, 285. Connexion between Church and State, identical with Connexion between the Church and the Roman Empire, 286. The Roman Empire under Constantine, divided into four Prefectures, 287; Prefectures divided into Dioceses or Vicariates, *ib.* Ecclesiastical Patriarchates of Rome, Constantinople, &c., *ib.* The Tendency and Object of Christianity, 288. Church under Constantine, 289, 299; during Time of Pepin le Bref, 293; of Charlemagne, *ib.* Identity of Church and State, 296. Growth of Authority and Pretension of the Pope after Death of Charlemagne, 298. Collision between Church and State, 302. Rights claimed by temporal Sovereign, *Jura magestatis circa sacra*, 302. Claim of Roman Pontiff to Title of Pope, to the Exclusion of all other Bishops, 302. The Corpus Juris Canonici, 305. See Papacy and Corpus Juris Canonici, &c.

Report, Parliamentary. See Papers.
 Reports of Cases. See List of Reports at Beginning of this Volume.
 Republics (South American,) Recognition of by Great Britain, 22.

——— (French,) *ib.*
 ——— (great,) their Rank among States, 51.

Respect and Honour, Marks of, between States, 33.

Responsales, 167.

Revolution, French (1791,) 59.

Revue Etrangère, 208.

Rhine, Confederation of, Assumption of new Titles by old Potentates, 30.

Richard L, Captivity of, in Austria, 186.

Richelieu (Governor of France,) Refusal to receive Grotius as Ambassador to France, 142. Arrest of Elector Palatine, 186.

Rights incident to Equality of States. See Equality.

Rio de la Plata, Treaty between and Great Britain, 22.

Ripperda (Duke of,) Case of, 212.

Robertson's (Ecclesiastical) Reports. See Reports.

Robespierre, 286.

Robinson's (Admiralty) Reports. See Reports.

Rodolph, Emperor, 313.

Rome, ancient, 162. When Christian

Church planted, 286. Divided into four Prefectures by Constantine, 286.
 Pope of. *See* Papacy.
 Roman Catholics, Report from Committee on Regulation of, in foreign Countries, 364.

— Church. *See* Religion—Papacy.

— Law, with respect to Ambassadors, 165.

—, Passages referred to:—

<i>Digest</i>	Lib.	I. t. ii. 2.	Page
"	I. t. iii. 3.	122.	283.
"	I. t. iii. 17.	94.	
"	I. t. iii. 23.	83.	
"	I. t. iii. 24.	85.	
"	I. t. iii. 26.	88.	
"	I. t. iii. 27, 28.	89.	
"	I. t. iii. 29, 30.	97.	
"	I. t. iii. 37, 38.	83.	
"	I. t. vii. 1, 1.	92.	
"	II. t. xiv. 1, pr.	56-82.	
"	II. t. xiv. 5.	60, 81.	
"	II. t. xiv. 27, 4.	111.	
"	II. t. xiv. 39.	94.	
"	II. t. xv. 9.	108.	
"	II. t. xviii. 1.	160.	
"	III. t. i. 1, s. 5.	149.	
"	III. t. iv. 1.	285.	
"	IV. t. ii. 12.	191.	
"	V. t. i. 22.	195.	
"	V. t. i. 24, 26.	160.	
"	V. t. i. 28.	196.	
"	V. t. iii. 20, s. 6.	86.	
"	V. t. iii. 23.	86.	
"	VIII. t. ii. 23.	92.	
"	X. t. iv. 19.	94.	
"	XII. t. i. 20.	89.	
"	XIV. t. vi. 7, s. 3.	97.	
"	XVI. t. i. 8, 14.	97.	
"	XVIII. t. i. 21.	94.	
"	XVIII. t. i. 33.	94.	
"	XIX. t. ii. 15, s. 4.	90.	
"	XIX. t. ii. 18.	90.	
"	XXIV. t. i. 5.	97.	
"	XXIV. t. i. 52.	90.	
"	XXVII. t. i. 13, 2.	94.	
"	XXXVIII. t. i. 21.	91.	
"	XXX. t. xxxix. 6.	91.	
"	XXXII. t. i. 69.	84.	
"	XXXIX. t. i.	196.	
"	XXXIX. t. ii.	196.	
"	XXXIX. t. iii.	196.	
"	XLIV. t. iii. 2.	92.	
"	XLV. t. i. 38, 18.	93.	
"	XLV. t. i. 80.	89.	
"	XLVII. t. x. 18.	36.	
"	XLVII. t. 22.	285.	
"	L. t. i. 25.	118.	
"	L. t. vii. 4.	149.	

<i>Digest</i>	Lib.	L. t. vii. 8.	194.
"	L. t. vii. 17.	165.	
"	L. t. xvi. 1.	85.	
"	L. t. xvi. 6.	94.	
"	L. t. xvi. 50.	85.	
"	L. t. xvi. 126.	87.	
"	L. t. xvi. 195.	92.	
"	L. t. xvi. 219.	95.	
"	L. t. xvii. 2.	149.	
"	L. t. xvii. 34.	83, 90.	
"	L. t. xvii. 45.	111.	
"	L. t. xvii. 67.	90.	
"	L. t. xvii. 81.	108.	
"	L. t. xvii. 114.	83, 90.	
"	L. t. xvii. 172.	94.	
<i>Codex</i>	Lib.	L. t. ii. 19, 23, 26.	285.
"	I. t. iii.	285.	
"	I. t. xiv. 12.	82.	
"	II. t. iii. 29.	159.	
"	III. t. xxxix. 5.	92.	
"	IV. t. lxi. 8.	210.	
"	IV. t. lxiii. 3—4.	154.	
"	V. t. xiii.	92.	
"	IX. t. xxxv. 5.	36.	
"	XI. t. xxix.	8.	
<i>Institutes</i>	Lib.	IV. t. iv.	36.
<i>Novells</i>	Lib.	VI. cc. ii., iii.	167.
"	CVII. c. i.	90.	
"	CXXIII. c. xxv., xxvi.	167, 441.	
"	CXXXI. t. c. i.	315.	

Ross, Bishop of. *See* Leslie.

Royal Honours, 46.

— Navy, Ships of, Contempt in British Merchant Vessels to pass without making required Salutes, 43. Precedence between Officers of and Consuls, 225. Colours to be carried by Ships of. *See* Colours.

Raynaldus, 335.

Rousset, Supplement, 67, 111.

Russia, Recognition of Peter the Great's Title as Emperor, 29. Treaty with Denmark with reference to maritime Honours, 45. Claims with France and Spain Precedence over other States, 49. Convention with Great Britain and King of Netherlands (1815,) Russo-Dutch Loan, 101. Treaty with Great Britain (1831) ditto, 103. Enactment of, as to Disputes against Members of Embassy, 208. Law as to Privileges, &c., of Ambassadors, 209. Regulations as to Consuls put forth by, 259. Papal Relations with Rome, 411.

Russell (Lord John,) Speech of, Debates on "Cracow," 101.

Russo-Dutch Loan, Conduct of Great Britain with respect to the, 101. Conventions entered into respecting, 101, 103. Motion of Mr. Hume in

the House of Commons in 1847, respecting, 105. Ditto of Lord Dudley Stuart in 1854, 106.
Rutherford, 79, 80, 83, 84.
Ryswick, Treaty of, 52, 67.

S.

Sa (Da,) Brother of Portuguese Ambassador, Case of, for Murder, 182.
Saalfeld, 27, 28, 240.
Sails, Salutes by, 44.
Salutes. *See* Maritime Ceremonials.
Sardinia, Papal Relations with Rome, 390.
Sauter, Fundam Jur. Eccl. Cathol., 338.
Savigny (R. R.,) 79, 81, 90, 91, 92, 94, 95, 116, 295, 300, 352.
Savoy, House of, hypothecated the Pays de Vaud to the Cantons of Berne and Freyburg, 69.
Saxony, Papal Relations with Rome, 405.
Scheldt, Attempt to open the Navigation of, by Emperor of Austria, 38.
Schmalz, 27, 28, 62, 63.
Schmauss, 20, 51, 52, 53, 67, 68, 70, 73, 74, 76, 242, 335, 386.
Schoell, Archives Historiques et Politiques, 368.
Schram, Institutiones Juris Ecclesiastici Publici et Privati, &c., 373.
Schröeckh, J. M., Christliche [Kirchengeschichte, 302, 345, 346.
Scots (Mary Queen of,) Case of, 38, 132, 139, 165, 176, 222.
Scott, Sir William, 112.
Sea, occupied by Fleet, 40.
Secretary of State, Approval of, necessary to the Appointment of Vice-Consuls, 256. Vice-Consuls cannot act without Sanction of, *ib.* Consul to transmit List of Vice-Consuls under him to, 257.
Semiramis, H. M. S., Complaint against Master of the *Native*, for passing without saluting, 43.
Seneca, 97.
Shakespeare, 310, 312.
Simon's Reports, 26. *See* Reports.
Sismond de Sismondi, 393.
Solon (M.,) Case of, 127.
Soller (M.,) Case of, 262.
Sophia (Princess,) Succession to British Throne, 75.
South American Republics, Mr. Caning's Reply to Spanish Minister of, on Recognition of, 22—24.
Sovereigns, Assumption of new Titles by, 27. Rights of, Subjects of International Law, 117. International

Status of, *ib.* Sovereignty of State may be invested in one or more Individuals, 118. Rights of, at Home, 119; abroad, *ib.* To redress in foreign Courts of Justice, *ib.* Jurisdiction of foreign Courts over Suite of, while in foreign Country, 120. Exemption of, from ceremonial Jurisdiction, 121. Privileges of Exterritoriality extended to *moveable* Effects of foreign Sovereigns, 123. Exempt from Custom Duties, *ib.* The like Goods destined for foreign Sovereign or his Family in Transit through foreign Countries, *ib.* Distinction between *moveable* and *immoveable* property of, 124. Case of the King of Prussia in the Matter of the Succession to the Principality of Orange, 124. Practice of English Courts in favour of Exemption of Sovereigns in Matters of private Contract, 125. Decisions in French Courts, 126. Disputes between two Sovereigns as to the Right of Ownership of private Property, where to be tried, 129. Nations may invoke the Arbitration of *third* Country, 129. How far Armies of a Nation may be employed in vindicating the private Rights of their Sovereign, 130. Family of the Sovereign, 130. Rights of Sovereign cease on his civil as well as natural Death, 131. Deposition or Abdication of, *ib.* Foreign Sovereign becoming Suitor in the Courts of another Country, 132. Right of Embassy, during Minority of Sovereign, lodged in Regency, 141. May waive Rights due to them in the Person of their Ambassador, 159.
Spain: claims, with France and Russia, Precedence over other States, 49. Becomes Guarantee for Succession to British Throne, after Death of Queen Anne, 75. Proceedings against Ambassador of, in English Court, 201. Law of, as to Privileges, &c., of Ambassadors, 207. Regulations promulgated by, respecting Consuls, 258. Relations with Rome, 376.
Spiritual Powers, foreign. *See* Papacy.
Spittler, Geschichte des Papstthums, 318.
Springer, (Swedish merchant,) Case of, 213.
Stanhope (Lord,) English Ambassador at Madrid, 212.
State Papers, 23. *See* Papers.

States, North American, Recognition of, by France, 21. Regulations of, as to Ceremonials instituted for Reception of foreign Ministers, 52. Law of, relating to Exterritoriality of Ambassadors, 206.

States, Rights of, incident to *Equality*, 1. To protect their Citizens in foreign Countries, 4. Debts of, 8. Property of Subjects liable to Debts of, 14. Marks of Honour and Respect between, 33. Right of, to maintain and preserve Reputation, 35. What Acts have been considered an Invasion of such Right, *ib.* Right of to confer what Titles of Dignity they please, 36. Insignia of, Insults offered to, 37. Competency of, to renounce Rights, 46. Rules with regard to Precedency at Conferences, 46. Right of, to International Privileges not affected by Change of Constitution, 48. Rank of, 49.

Status of Consuls, Treaties illustrating, 249. International, of foreign spiritual Powers, 277.

STATUTES REFERRED TO.	Page.
37 Edw. III. st. 1, c. 1.	413.
38 Edw. III. st. 2.	413.
13 Rich. II. st. 2, c. 2.	414.
16 Rich. II. c. 5.	414.
2 Hen. IV. c. 3.	414.
3 Hen. V. st. 2, c. 4.	414.
32 Hen. VI. c. 1. (Ireland) all Statutes against Provisions in England and Ireland to be kept in force	414.
2 Edw. IV. c. 3.	414.
7 Edw. IV. c. 2, (Against Bulls from Rome)	414.
10 Hen. VIII. c. 5. (An Act against Provisors to Rome)	414.
23 Hen. VIII. c. 20. (An Act restraining payment of <i>Annates</i> to the See of Rome)	414.
24 Hen. VIII. c. 12. The great Statute forbidding Appeals to Rome, under Pain of <i>Præmunire</i>)	414.
25 Hen. VIII. c. 19. (Act of the Submission of the Clergy, and the Restraint of Appeals)	414.
25 Hen. VIII. c. 20. (Act for Nonpayment of First-fruits to the Bishop of Rome)	414.

25 Hen. VIII. c. 21. (Concerning Peter's Pence and Dispensations)	414.
28 Hen. VIII. c. 13. (Ireland.) An Act against the Authority of the Bishop of Rome	414.
28 Hen. VIII. c. 16. (As to Dispensations and Licences heretofore obtained from the See of Rome)	414.
28 Hen. VIII. c. 19. (Ireland.) The Act of Faculties	414.
1 Eliz. c. 1, s. 36.	316.
5 Eliz. c. 1.	316.
13 Eliz. c. 2.	316.
12 & 13 Will. III. c. 2.	76.
7 Anne c. 12.	198, 266.
26 Geo. III. c. 84.	426.
55 Geo. III. c. 115.	102.
3 Geo. IV. c. 110.	44.
6 Geo. IV. c. 23.	272.
6 Geo. IV. c. 78.	257.
6 Geo. IV. c. 87.	257, 275.
6 Geo. IV. c. 108.	44.
2 & 3 Will. IV. c. 81.	102.
3 & 4 Will. IV. cc. 50. 53.	44.
4 Will. IV. c. 13.	44.
5 Vict. c. 6, s. 1.	427.
6 & 7 Vict. c. 94.	272.
7 & 8 Vict. c. 112.	258.
8 & 9 Vict. c. 87, s. 10.	44.
11 & 12 Vict. c. 108.	419.
12 & 13 Vict. c. 62.	257.
13 & 14 Vict. c. 111.	213.
14 & 15 Vict. c. 60. (An Act to prevent the Assumption of certain ecclesiastical Titles in respect of Places in the United Kingdom)	424.
14 & 15 Vict. c. 99,	114.
17 & 18 Vict. c. 104,	44, 258.
Stephen II. (Bishop of Rome,) 294.	
Stephens (Blackstone,) 175, 205.	
Story, American Constitution, 79, 110, 151. On the Conflict of Laws, 13, n.	
Stowell (Lord,) Judgment of, in the <i>Indian Chief</i> , 269.	
Strype, 131.	
Stuart (Lord Dudley,) Motion of, in House of Commons (1854,) respecting Russo-Dutch Loan, 106.	
Suarez, 79.	
Suite, of Ambassador, Exemption of, from Civil Jurisdiction of foreign Country, 196.	
Sully (Duc de,) French Ambassador, Case against one of Retinue of, for Murder, 178.	

land (1753,) 247. Papal Relations with Rome, 393.

U.

Ulpian, 57.

United Netherlands, Recognition of Republic of, by Spain, 20.

— States, Laws of, as to Consuls.

See Consuls.

Universities of Europe, Expositors of international Law, 318.

Utrecht, Treaty of, (1713,) 52, 59, 87.

Bishop of Bristol, Plenipotentiary at Peace of, 222.

V.

Valentinian III., 292, 356.

Valin, 240.

Van Espen, 372.

Van Hoey (M.), Dutch Ambassador at France, Case of, 182.

Vattel, 1, 3, 4, 8, 15, 27, 28, 29, 32, 33, 35, 36, 37, 39, 46, 47, 48, 55, 57, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 80, 84, 85, 93, 96, 99, 107, 109, 110, 113, 117, 134, 135, 136, 137, 141, 142, 148, 153, 155, 156, 157, 158, 159, 172, 174, 187, 192, 193, 196, 197, 210, 216, 217, 219, 220, 221, 223, 225, 226, 231, 238, 241, 247, 260, 279.

Venerabilem (Decretal,) 308. *See* Corpus Juris Canonici.

Venice, Claims of, to maritime Honours in the Adriatic, 44. Republic of, Quarrel with Papal Government (1364,) on account of Outrages on Consuls of Republic, 261.

Verona, Congress at (in 1825,) 46.

Vesey's Reports. *See* Reports, List of.

Vesey and Beame's Reports. Ditto.

Vice-Consuls. *See* Consuls.

Viceroy possesses Right of Embassy, 142.

Vienna, Congress of, Recognition of Titles at, 30. Treaty (of 1725 and 1738,) 52. Treaty of (1815,) 59. Treaty of, between Austria and Spain (1725,) 74. Act of, 9th June, (1815,) 130. Congress of, (1815,) 217, 222.

Virg. *Æn.*, 282.

Voltaire, *Essaie sur les Mœurs et l'Esprit des Nations*, 314.

Von Houtheim, de Statu Ecclesiæ et legitimâ Potestate Romanâ, 373.

W.

Wachsmuth, 161.

Walter's Kirchenrecht, 286, 310, 321, 325, 397.

Ward, Law of Nations, 134, 139, 154, 168, 174, 175, 177, 184, 187, 217, 313, 314.

Warnkönig, Inst. Juris, Romani Privati, 56, 285.

Washington's (American) Reports. *See* Reports, List of.

Weimer (Duke of,) 31.

Wellesley (Lord,) Speech in the House of Lords on the Motion for a Committee to inquire into the State of the Laws affecting Roman Catholics (April, 1812,) 282.

Wenck, Cod. J. G., 29, 53, 68, 242, 247, 250.

Westphalia, Treaty of (1648,) 58, 66. Peace of, Guarantees at, 73, 217. Papacy from the Time of, 352.

Wheaton, Elements, 27, 33, 39, 52, 55, 72, 137, 147, 148, 154, 188, 193, 197, 209, 221, 225, 226, 228, 229, 230, 240. History, 53, 72, 73, 75, 134, 137, 219, 221, 225, 226, 228, 229, 240. Droit International, 231. Reports, *See* Reports, List of.

Whitworth (Mr.), 206.

Wicquefort, 134, 142, 152, 154, 160, 165, 174, 180, 187, 196, 197, 210, 213, 224, 240, 260, 261, 266.

Wife of Ambassador, Privileges of Embassy extended to, 196.

Wildman, 79, 87, 88, 134, 240.

Wolff, 84.

Wortley (Mr. Stuart,) Speech of, in Debates on Cracow, 102.

Wreche (Baron de,) Minister of France from Landgrave of Hesse Cassel, Case of, 200.

Wurtemberg, Papal Relations with Rome, 406.

Z.

Zacharia, 70.

Zea, (M.), Spanish Minister, Reply of Mr. Canning to the Remonstrance of, respecting Recognition of South American Republics by Great Britain, 22.

Zouch, 41, 118, 121, 134, 143, 145, 148, 149, 151, 174, 177, 183, 189, 284.

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